No. 87-191

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1987

ANN FLAMM and ARNOLD FLAMM, on behalf of a class,

Petitioners,

v.

RUDOLPH EBERSTADT, JR., and MICRODOT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT,
N.D. IILLINOIS, E. D.

Oct. 19, 1976.

Ann FLAMM and Arnold M. Flamm,
Plaintiffs,

v.

Rudolph EBERSTADT, Jr., and Microdot, Inc.,
Defendants.

No. 76 C 427.

MEMORANDUM OPINION

FLAUM, District Judge:

Plaintiffs, Ann and Arnold M. Flamm, are co-trustees of a trust which purchased and sold shares of stock of defendant Microdot, Inc. The complaint alleges that during the period beginning on December 5, 1975 and ending on January 23, 1976 the defendants made false and material misstatements or omissions in connection with the sale of Microdot common stock during the pendency of a tender offer by General Cable Corp., in violation of the Securities Exchange Act of 1934, §§ 10(b), 14(e), 15 U.S.C. §§ 78j(b), n(e). Plaintiffs seek damages for themselves as well as the right to represent a class composed of:

> All sellers of the common stock of Microdot, Inc. during the period beginning on December 5, 1975 and ending at the close of business on January 23, 1976, excluding the defendants and those in concert with them.

Before the court are plaintiffs' and defendants' motions raising the question of whether or not this cause should proceed as a class action. Rule 23(a) of the Federal Rules of Civil Procedure provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

While defendants argue that plaintiffs have failed to establish several of the abovementioned criteria, it is the fourth requirement of fair and adequate representation that the defendants urge as the primary reason for why class certification in this cause, at this time, would be inappropriate.

Defendants' argument for why plaintiffs in this cause will not fairly and adequately protect the interests of the class they seek to represent is premised upon certain undisputed facts. It appears that Arnold M. Flamm is an attorney practicing in partnership with Arthur T. Susman, one of the two attorneys of record for plaintiffs in this cause, in a firm named Prins, Flamm and Susman, Ltd. The second attorney of record, Thomas R. Meites, is a private practitioner who rents and shares office space in the same suite as is occupied by plaintiff's firm. Moreover, the second plaintiff in this suit, Ann Flamm, is the mother of Arnold M. Flamm. Finally, it appears that the recovery to be had by the individual plaintiffs in this case will be much less than the possible attorney's fees generated by the prosecution of this suit as a class action.[1]

Defendants contend that these facts demonstrate that

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[1] The recovery to the individual plaintiffs will be approximately $800. However, it should be further noted that plaintiffs sue in their capacity as trustees of an inter-vivos trust so that they themselves may not receive any form of recovery at the termination of this action.

the plaintiffs will be faced with a conflict of interest which could or will prevent them from fairly and adequately representing the interests of the proposed class. Thus, defendants argue, because of the minimal recovery which the plaintiffs seek individually, plaintiffs may be inclined to act in such a way as to maximize the return from this suit to their associates who are representing them, a return which Arnold Flamm might share in as a member of his attorney's law firm. Moreover, defendants suggest that if Arnold Flamm is represented by his own law firm ethical considerations might foreclose the possibility of him testifying in this cause to the detriment of the class he seeks to represent.

It should be noted at the outset that the burden is on the plaintiff seeking class certification to establish that he will fairly and adequately represent the interests of the proposed class. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974); *Cullen v. United States*, 372 F.Supp. 441, 445 (N.D.Ill.1974); *Graybeal v. American Savings & Loan Assoc.*, 59 F.R.D. 7, 13 (D.D.C.1973). Moreover, it is the obligation of this court in determining whether or not the named plaintiffs are proper representatives of the proposed class to minimize as much as practicable the potentiality that the named plaintiffs' interests will be antagonistic to the interests of the class. *Phillips v. Klassen*, 163 U.S.App.D.C. 360, 502 F.2d 362, 365-66, *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1117 (7th Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970). *Cf. Cullen v. United States*, *supra* at 447-48.

While it is true that the Seventh Circuit has yet to pass on the question of whether or not it is appropriate for an attorney to represent himself in a suit and at the same time attempt to represent a class, or whether such an

attorney may have his law associates represent him,[2] many other courts have disapproved of such practices. *See, Conway v. City of Kenosha*, 409 F.Supp. 344 (E.D.Wisc.1975) (plaintiff represented himself); *Seiden v. Nicholson*, 69 F.R.D. 681 (N.D.Ill.1975) (plaintiff represented himself); *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974) (plaintiff was wife of attorney of record); *Graybeal v. American Savings & Loan Assoc.*, 59 F.R.D. 7 (D.D.C.1973) (plaintiff represented himself); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y.1972) (plaintiff member of firm representing him); *Shields v. Valley Nat'l Bank of Arizona*, 56 F.R.D. 448 (D.Ariz. 1971) (plaintiff represented himself); *Shields v. First Nat'l Bank of Arizona*, 56 F.R.D. 442 (D.Ariz.1972) (plaintiff represented himself); *Kriger v. European Health Spa, Inc.*, 56 F.R.D. 104 (E.D.Wisc.1972) (plaintiff member of firm representing him). *Cf. Eovaldi v. First Nat'l Bank of Chicago*, 57 F.R.D. 545 (N.D.Ill.1972) (class certified even though plaintiff sought to act as co-counsel since other attorneys also sought to represent the class); *Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n*, 66 F.R.D. 581 (E.D.Penn.1975) (class certified even though plaintiff 's firm represented him because other independent plaintiffs were also named). In its research, this court has found only two cases which have directly allowed an attorney, or his firm, to represent himself as a class representative. *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265 (E.D.Penn. 1975) (plaintiff member of firm representing him); *Lamb v. United Security Life Co.*, 59

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[2] It should be noted that the Seventh Circuit has had called to its attention such a situation. In *Goldman v. First Nat'l Bank of Chicago*, 532 F.2d 10 (7th Cir. 1976), the court stated in a footnote that, "Goldman's withdrawal as counsel in the case removed the judge's major objection to his acting as the representative party for the class." *Id.* at 15 n. 6. All that can be said about this statement is that the Seventh Circuit did not disapprove of the district court's concern with having a lawyer being the class representative and counsel in the cause.

F.R.D. 25 (S.D.Iowa 1972) (plaintiff representing himself).

This court is in agreement with the vast majority of other courts that such an arrangement, whereby a plaintiff seeks to represent a class and act as his own attorney or retains his own law firm or associates places a millstone around the plaintiff's neck which might prevent him from properly representing the proposed class. As pointed out by the court in *Graybeal v. American Savings & Loan Assoc.*, *supra*,

> Plaintiffs have placed themselves in the dual roles of attorneys for, and representatives of, the proposed class. These dual roles are inherently fraught with potential conflicts of interests. In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, and where, as here, the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole. Thus plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class.

Id. at 13-14. Moreover, the court in *Kriger v. European Health Spa, Inc.*, *supra*, has pointed out the evidentiary problem which might arise if the proposed class representative seeks to testify in the cause:

> [A] burdensome ethical question would be raised if the plaintiff were to be called as a witness while his firm is employed in the matter. The plaintiff responds that he can pursue the matter without testifying, or, if he should be required to testify, his employers can withdraw as counsel. I find the latter solution unsatisfactory. A person wishing to represent a class must be able to demonstrate "the forthrightness and vigor . . . which the repre-

> sentative party can be expected to assert." . . . This plaintiff has commenced an action under a disability that no other member of the class is likely to have–an inability to testify except at the cost of withdrawal of counsel familiar with the case from its inception. It is not enough to say that his testimony may not be needed; the possibility of such a need makes him less capable of adequate representation than others in the class.

Id. at 105-06 (citation omitted).

This court recognizes the importance of class actions as a mechanism by which those who have suffered small injuries can band together for the purpose of vindicating their rights. Just recently, in an unpublished memorandum opinion, this court certified a class in a 10b-5 action where all elements for class certification were met. *Shofstall v. Allied Van Lines*, No. 74 C 2067 (N.D.Ill., July 8, 1976). However, this court also recognizes that class actions have the potential for abuse so as to make them more a vehicle for enrichment of the private bar rather than a tool to prevent unlawful activity. *See In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974). Class actions have been criticized, moreover, because they tend to raise ethical questions concerning the solicitation of law suits by attorneys. *See Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir., 1976). Arrangements such as the one presently before the court can only add support for the critics who wish to see class actions limited. Furthermore, this court cannot agree with some that if there are any possible abuses which could occur when the class representative is a member of the firm which seeks to represent the class in the law suit that the court, as guardian of the class, can adequately police and protect the class' interests. *See, e.g., Lamb v. United Security Life Co.*, 59 F.R.D. 25, 31 (S.D. Iowa 1972). The court, as a protector under rule 23(c), can never replace an aggressive and interested plaintiff who seeks vindication of his rights. The plaintiff must truly be interested in the "outcome" of

the litigation so that the class can properly have two protectors of its interests. *See In re Goldchip Funding Co.*, 61 F.R.D. 592 (M.D.Penn. 1974).

Therefore, this court finds that when the class representative is a close professional associate with the attorney of record in the cause, the class representative can not adequately and fairly represent the class and certification should be denied. Plaintiffs herein raise several arguments, which need little comment, as to why this rule need not apply here. First, plaintiffs argue that Ann Flamm is a totally independent class representative not faced with any conflict of interests. However, Ms. Flamm is the mother of Arnold Flamm and as such can not be characterized as a totally independent class representative. Moreover, Ms. Flamm sues as a trustee, and as the defendants point out, she could not have filed her action without also joining Arnold Flamm. Second, plaintiffs contend that although Mr. Meites does share office space with Arnold Flamm's firm of Prins, Flamm and Susman, Ltd., that Mr. Meites is completely independent of and not professionally associated with plaintiff Flamm's law firm. While it may be true that there is no "legal" relationship between Mr. Meites and Mr. Flamm, this court is aware that legal work is done in which Mr. Meites collaborates with the firm of Prins, Flamm and Susman, Ltd. *See, e.g., Susman v. Lincoln American Corp.*, No. 73 C 1089 (N.D.Ill., filed April 26, 1973) (a case also seeking class certification and where both the firm of Prins, Flamm and Susman, Ltd., and Mr. Meites are attorneys of record).

Third, plaintiffs argue that Mr. Flamm has waived any interest in fees and therefore there is in fact no conflict of interest. But, as defendants point out, the firm of Prins, Flamm and Susman, Ltd., is a professional service corporation organized under the laws of the State of Illinois and therefore such a waiver is not possible. While the plaintiffs

have not responded to this point, all the court need state is that it is the spectre of conflict of interest which moves the court to deny class certification here and not the actuality of such a conflict. And finally, plaintiffs raise the argument that it seems strange for the defendants, who would rather see no law suit in this case, to argue for the protection of the class. *See Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265, 275 (E.D.Pa.1975). However, the manner in which the fact of inappropriate representation is presented to the court is immaterial to the requirement that plaintifs must establish that they are proper representatives.

In conclusion, the court wishes to indicate that there has been no act of impropriety committed by any of the plaintiffs or their attorneys. Moreover, the court wishes to indicate that it is not saying that in an ordinary case a plaintiff can not be represented by a close professional associate. All the court is saying is that a class action cannot be maintained in an action such as this since the requirements of rule 23(a)(4) have not been met. Plaintiffs can seek different counsel if they so desire to dispel any possibility of conflict of interest. Thus, this lawsuit may continue; it may not however, at this time, proceed as a class action.

It is so ordered.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM,
Plaintiffs,

v.

RUDOLPH EBERSTADT, JR., and MICRODOT, INC.,
Defendants.

76 C 427

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

Before the court is plaintiff's motion for reconsideration, or in the alternative for certification pursuant to 28 U.S.C. § 1292(b), of this court's October 19, 1976 ruling. First, plaintiff's motion for reconsideration is denied. Second, the motion for certification is granted.

This court believes that certification of its October 19, 1976 ruling is appropriate for several reasons. First, as a practical matter, the question of law decided by this court may be determinative of this cause since the expected recovery by the plaintiffs is relatively small and might not justify the continued prosecution of this suit. Thus, a controlling question of law has been decided and an appeal at this time will materially advance the ultimate termination of the litigation. Second, although this court is of the opinion that the rule enunciated in the October 19, 1976 decision is the better and most appropriate resolution of the legal and ethical considerations posed, there does exist differences as to the proper approach to be taken in this area. Moreover, neither the Seventh Circuit nor any other court of appeals has decided the issues presented in this cause, particularly in the context of a petition for class certification. Third, and most important, the issues decided

by this court may have extensive effect upon the prosecution of many class actions presently pending in the district courts.[1] The matters raised in the October 19, 1976 ruling touch not only questions concerning the prosecution of class actions, but are relevant as well to the moral and ethical obligations of attorneys bringing such suits.

Therefore, for the foregoing reason this court certifies for present appeal the October 19, 1976 ruling in this cause.

It is so ordered.

/s/ JOEL M. FLAUM
United States District Judge

Dated: December 7, 1976

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[1] As of June 30, 1976, there were 489 class action suits pending in the Seventh Circuit alone. Administrative Office of the United States Courts, 1976 Annual Report of the Director 122, table 38 (1976).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 25, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR. Circuit Judge

ANN FLAMM and ARNOLD FLAMM, Misc. No. 76-8119
Plaintiffs-Appellants,

vs.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants-Appellees

MICHAEL SUSMAN, Misc. No. 77-8003
Plaintiff-Appellant

vs.

LINCOLN AMERICAN CORP., et al,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 76 C 427
No. 73 C 1089

Judge Flaum

These matters come before this Court on the filing herein of the separate documents entitled "PETITION FOR PERMISSION TO APPEAL" by counsel for the plaintiffs-appellants. Counsel for the different sets of defendants filed separate answers in opposition thereto. Upon a thorough consideration of the documents filed herein, this Court being fully advised in the premises,

IT IS ORDERED that the plaintiffs-appellants in each of these cases are hereby GRANTED permission to appeal from the interlocutory orders of the District Court in accordance with the provisions of 28 U.S.C. 1292(b).

IT IS FURTHER ORDERED that these two matters be CONSOLIDATED, upon docketing, for procedural purposes in this Court.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

Michael SUSMAN,
Plaintiff-Appellant,

v.

LINCOLN AMERICAN CORP. et al.,
Defendants-Appellees.

Ann FLAMM and Arnold Flamm,
Plaintiffs-Appellants,

v.

Rudolph EBERSTADT, Jr. and Microdot, Inc.,
Defendants-Appellees.

Nos. 77-1145, 77-1146.

Argued April 27, 1977.
Decided Aug. 31, 1977.

Before PELL, BAUER and WOOD, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge.

In the two cases consolidated for our consideration, appellants contest the validity of the district court's judgment denying certification of their class action.[1] In each case the district judge ruled pursuant to Fed.R.Civ.P.

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[1] This court on January 25, 1977, granted appellants permission to appeal pursuant to 28 U.S.C. § 1292(b). This court also ordered on January 25, 1977, that the two cases be consolidated on appeal for procedural purposes.

23(a)(4)[2] that the class representative would not fairly and adequately protect the interests of the class. For the following reasons, the judgment of the district judge is affirmed.

The facts in these cases are as follows:

1. The Microdot case.

Plaintiffs-Appellants Ann Flamm and Arnold Flamm (hereinafter referred to as plaintiffs) are co-trustees of a trust which purchased and sold shares of defendant Microdot, Inc.'s stock. Plaintiffs' complaint generally alleges that defendants made false and material misstatements or omissions in connection with the sale of Microdot common stock during the pendency of a tender offer by General Cable Corporation in violation of the Securities Exchange Act of 1934, §§ 10(b), 14(e), 15 U.S.C. §§ 78j(b), 78n(e). Plaintiffs sought to represent a class composed of:

> All sellers of the common stock of Microdot, Inc. during the period beginning on December 5, 1975 and ending at the close of business on January 23, 1976, excluding the defendants and those in concert with them.

Defendants opposed certification of the class on the grounds that plaintiffs would not fairly and adequately protect the interests of the class. The district court summarized the following undisputed facts as forming a basis for defendants' objection: 1) plaintiff Arnold M. Flamm is an attorney practicing with Arthur T. Susman, one of the

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[2] Fed.R.Civ.P. 23(a) enumerates four prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

two attorneys of record for plaintiffs, in a law firm named Prins, Flamm, and Susman, Ltd.; 2) plaintiff Ann Flamm is the mother of Arnold M. Flamm; (3) Thomas R. Meites, the second attorney of record of plaintiffs, rents and shares office space in the same suite of offices as is occupied by Prins, Flamm, and Susman, Ltd.; and 4) the potential recovery for individual plaintiffs of $800.00 is much less than attorney's fees which could be generated by this lawsuit. The district judge also noted that since plaintiffs are suing in their capacity as trustees of an inter-vivos trust, they would not receive any form of recovery at the termination of this case.

The district court ruled "that when the class representative is a close professional associate with the attorney of record in the cause, the class representative cannot adequately and fairly represent the class and certification should be denied." The district judge based this ruling on several policy considerations. First, the district court ruled that since potential recovery from attorney's fees greatly exceeds possible individual recovery, plaintiffs' role as class representative and interest in the law firm which would represent the class gives rise to a possible conflict of interest. The district court also pointed to an ethical question which would arise if plaintiff Arnold M. Flamm were to be called as a witness while his firm is employed as class attorney. Similarly, citing ethical questions concerning the solicitation of lawsuits by attorneys, the lower court noted that arrangements such as exist in the present case can only add support for the critics who wish to see class actions limited. Finally, the district judge rejected the argument that since the court could protect the class from any abuse which might occur by reason of the relationship between plaintiff and counsel, the requirements of Rule 23(a)(4) should not be strictly applied. Instead, the court ruled that an aggressive and interested class representative is required under Rule 23(a)(4).

The district judge also rejected defendants' argument that these policy considerations do not apply to Ann Flamm. First, the court pointed out that since Ann Flamm is the mother of Arnold M. Flamm, she cannot be characterized as totally independent. In addition, because the suit was filed by plaintiffs as co-trustees of an inter-vivos trust, the district judge stated that Ms. Flamm could not have filed suit without joining Arnold M. Flamm. Similarly, although there is no "legal" relationship between Mr. Meites and Mr. Flamm, the lower court stated that Mr. Meites is not independent of Mr. Flamm inasmuch as legal work is done in which Mr. Meites collaborates with the firm of Prins, Flamm, and Susman, Ltd. Finally, the lower court ruled that Arnold M. Flamm's waiver of interest in fees potentially generated by this case does not eliminate the potential for a conflict of interest. The district judge found that a conflict of interest might still exist since, as defendants pointed out, a waiver of an interest in fees may not be possible in a professional service corporation organized under the laws of the state of Illinois. The court stated:

> While plaintiffs have not responded to this point, all the court need state is that it is the spectre of conflict of interest which moves the court to deny class certification here and not the actuality of such a conflict.

2. The Lincoln American case.

Plaintiff-Appellant Michael Susman (hereinafter referred to as plaintiff) alleged in his complaint that defendants had acted deceptively and made misstatements and omissions of material facts in connection with the purchase and sale of securities and the solicitation of proxies in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5. Plaintiff filed suit both derivatively on behalf of Consumers National Corporation and also sought to act as representative of a class of Consumers National Corporation common stock share-

holders.

Defendants opposed plaintiff's motion for certification of the class on the grounds that plaintiff did not satisfy the requirements of Fed.R.Civ.P. 23(a)(4). The basis for defendants' motion was that plaintiff is the brother of Arthur Susman, one of two attorneys representing plaintiff. The other attorney representing plaintiff is Thomas R. Meites. As was the case in *Microdot*, Mr. Meites rents and shares office space in the same suite of offices occupied by Arthur Susman's law firm. The potential recovery for plaintiff is $500.

Relying on the same analysis as was applied in his prior decision in *Microdot*,[3] the district judge ruled that:

> where an individual plaintiff is represented by a member of his immediate family and/or one of his relatives' close associates, class certification is inappropriate since the plaintiff fails to satisfy the requirements of Fed.R.Civ.P. 23(a)(4).

Plaintiffs in both of the cases now before this court jointly argue on appeal that the district court decision,

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[3] Although plaintiff is not a member of his brother's law firm, the district judge nonetheless concluded that a possible conflict of interest exists. The lower court stated:

> Even though plaintiff does not expect to share in any attorney's fees recovered in this cause, there exists the possibility that one so situated will become more interested in maximizing the "return" to his counsel than in aggressively presenting the proposed class' claims. For example, such a party might promote and be more receptive than other potential class representatives to a settlement agreement whereby his counsel might receive a relatively large and early fee which is not, in fact, in the best interests of the proposed class. While it is true that such "quick" settlements are possible in all class actions suits, the possibilities increase where there is a close personal and/or professional relationship between the named plaintiff and the attorneys seeking to represent the class.

which they characterize as a *per se* approach, is improper. Plaintiffs assert that the adequacy of class representatives should be determined under the same rules as apply to fiduciaries acting on behalf of others in a non-class action context. Plaintiffs contend that in non-class action settings, a showing of actual danger of conflict of interest rather than the mere possibility of a conflict of interest is required to support a finding that a fiduciary will not adequately represent the interest of others. Plaintiffs argue that no actual danger of a conflict of interest exists in the present case since plaintiffs will not share in any attorney's fees which might be awarded to class counsel. Plaintiffs also contend that neither ABA Canons of Professional Ethics No. 9, nor *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976), *cert. denied*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 94, a case relied upon by defendants, supports the "spectre of conflict" approach utilized by the district judge. Plaintiffs next assert that the district judge's reliance on the class representative to protect the interests of absent class members is unrealistic. According to plaintiffs, the class representative who has little knowledge of the facts of the case and relatively little at stake in the outcome of the suit inevitably relies on the class attorney. Plaintiffs assert that in reality the class attorney rather than the class representative protects the interests of the absent class members. Finally, plaintiffs point to alternative methods of protecting absent class member interests which could avoid disqualification of plaintiffs as class representatives under Rule 23(a)(4).

Prior to certification of a class, a court must find that the named representatives of the class will fairly and adequately protect the interests of the class. "Basic consideration of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment." *National Asso-*

ciation of Regional Medical Programs v. Mathews, 551 F.2d 340 (D.C.Cir.1976). Strict oversight is necessitated since due process requires that absent class members be adequately represented in order to be bound by a court's judgment.[4] *National Association of Regional Medical Programs*, 551 F.2d at 344-5; *Hansberry v. Lee*, 311 U.S. 32, 42-43, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); Wright & Miller, Federal Practice and Procedure, § 1765, p. 617. "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3rd Cir. 1975), B*cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679;. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968); *Cross v. National Trust Life Insurance Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977). Whether a party would adequately protect the interests of the class is a question of fact depending on the circumstances of each case. *Schy v. Susquehanna Corporation*, 419 F.2d 1112, 1116 (7th Cir. 1970), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55; Wright &

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[4] As the court stated in *Hansberry v. Lee*, 311 U.S. 32, 42-45, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940):

> With a proper regard for divergent local institutions and interests . . . this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. . . .
>
> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . . .

Miller, Federal Practice and Procedure, § 1765, p. 622. A district judge's determination of the adequacy of representation is a matter of discretion and will not be disturbed on appeal unless abuse of discretion is shown. *Morris v. McCaddin*, 553 F.2d 866, 870 (4th Cir. 1977); *Brick v. CPC Intern., Inc.*, 547 F.2d 185 (2d Cir. 1976); Wright & Miller, Federal Practice and Procedure, § 1765, p. 623. A putative class representative has the burden of convincing the trial court that the mandatory requirements of Rule 23(a) have been satisfied. *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976); *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d 699, 706-707 (4th Cir. 1976); Wright & Miller, Federal Practice and Procedure, § 1765, p. 626.

The district judge found in both of the cases now before this court that plaintiffs would not adequately protect the interests of the class because of the relationship of plaintiffs to plaintiffs' counsel. The lower court's decision is supported by a majority of courts which have refused to permit class attorneys,[5] their relatives,[6] or business associ-

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[5] In the following cases, a putative class attorney was prohibited from simultaneously acting as class representative. *Seiden v. Nicholson*, 69 F.R.D. 681 (N.D.Ill. 1976); *Graybeal v. American Savings & Loan Association*, 59 F.R.D. 7 (Dist.Col. 1973); *Shields v. Valley National Bank of Arizona*, 56 F.R.D. 448 (D.Ariz.1971); *Shields v. First National Bank of Arizona*, 56 F.R.D. 442 (D.Ariz.1972); *Eovaldi v. First National Bank of Chicago*, 57 F.R.D. 545 (N.D.Ill.1972); *Conway v. City of Kenosha, Wis.*, 409 F.Supp. 344 (E.D.Wis.1975). *Contra, Lamb v. United Security Life Company*, 59 F.R.D. 25 (S.D.Iowa 1972). Although the court in *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48 (M.D.N.C. 1976), allowed the same individual to act as class representative and class counsel, two additional class representatives were involved in that suit.

[6] The court in *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y.1974), held that the wife of a member of the law firm which would act as class counsel could not qualify as class representative. See

(Footnote continued on the following page)

ates[7] from acting as the class representative.

The most frequently cited policy justification for this line of cases arises from the possible conflict of interest resulting from the relationship of the putative class representative and the putative class attorney. Since possible recovery of the class representative is far exceeded by potential attorneys' fees, courts fear that a class representative who is closely associated with the class attorney would allow settlement on terms less favorable to the interests of absent class members. *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y.1974); *Graybeal v. American Savings & Loan Assn.*, 59 F.R.D. 7 (Dist.Col.1973). Courts also have expressed fear as to the danger of champerty because of the close relationship between the putative class representative and counsel. *Byrnes v. IDS Realty Trust*, 70 F.R.D. 608, 614 (D.Minn.1976); *Shields v. Valley National*

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6 *(Continued)*

also *Toroff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976); *Bogus v. American Speech and Hearing Association*, 20 F.R.Serv.2d 859 (E.D.Pa.1975). *Contra, Sweet v. Bermingham*, 65 F.R.D. 551 (S.D.N.Y.1975); *Fischer v. International Tel. & Tel. Corp.*, 72 F.R.D. 170 (E.D.N.Y. 1976).

[7] The courts in the following cases ruled that a plaintiff associated with the putative class attorney's law firm cannot adequately protect class members interests. *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976); *Brick v. CPC Intern., Inc.*, 547 F.2d 185 (2d Cir. 1976); *Kriger v. European Health Spa, Inc., of Milwaukee, Wis.*, 56 F.R.D. 104 (E.D.Wis.1972); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y.1972). See also *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976). *Contra, Stull v. Baker* [1973 Transfer Binder] CCH Fed.Sec.L.Rep ¶ 94,227 at ¶ 94,929 (S.D.N.Y.1973); *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265 (E.D.Pa.1975) (dicta).

In *Sommers v. Abraham Lincoln Federal Savings and L. Ass'n*, 66 F.R.D. 581 (E.D.Pa. 1975), one of each of the five plaintiff couples was employed by plaintiffs' counsel's law firm. The court concluded that inadequacies which may have existed had been cured by the intervention of numerous other named plaintiffs.

Bank of Arizona, 56 F.R.D. 448, 450 (D.Ariz.1971). Ethical considerations have also been cited as a basis for denial of class certification in these cases. Judge Gordon in *Kriger v. European Health Spa, Inc., of Milwaukee, Wis.*, 56 F.R.D. 104, 105-6 (E.D.Wis.1972), cited possible ethical questions which would be raised if the class representative were to be called as a witness while his law firm is employed in the matter:

> All parties agree that a burdensome ethical question would be raised if the plaintiff were to be called as a witness while his firm is employed in the matter. The plaintiff responds that he can pursue the matter without testifying, or if he should be required to testify, his employers can withdraw as counsel. I find the latter solution unsatisfactory. A person wishing to represent a class must be able to demonstrate "the forthrightness and vigor . . . which the representative party can be expected to assert." *Mersay v. First Republic Corp.*, 43 F.R.D. 465, 470 (S.D.N.Y.1968). This plaintiff has commenced an action under a disability that no other member of the class is likely to have – an inability to testify except at the cost of withdrawal of counsel familiar with the case from its inception. It is not enough to say that his testimony may not be needed; the possibility of such a need makes him less capable of adequate representation than others in the class.

Finally, in a different but related context, the court in *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976), held that a motion for disqualification of an attorney acting as class counsel should be granted pursuant to ABA Canons of Professional Ethics No. 9 where even an appearance of an improper conflict of interest exists because of the close relationship of the putative class representative and putative class attorney.

Our circuit has not yet considered the question of adequacy of representation when a close relationship exists

between plaintiff and his attorney.[8] The Second, Third and Sixth Circuits have, however, considered various aspects of this question.

In *Brick v. CPC Intern. Inc.*, 547 F.2d 185 (2d Cir. 1976), the attorney of record for the plaintiff was plaintiff's sole law partner. The district judge denied plaintiff's motion for class certification "because of concern over the ethical problems posed by the attorney-plaintiff relation-

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[8] In *Goldman v. First National Bank of Chicago*, 56 F.R.D. 587 (N.D.Ill.1972), defendant questioned the ability of plaintiff to act as class representative on the grounds that plaintiff was also acting as attorney of record. Then District Judge Bauer without ruling on the question noted the following language from *Shields v. Valley National Bank*, 56 F.R.D. 448 (N.Ariz.1972):

> The Court ... feels that Shields has not demonstrated competence to represent the class because he seeks to be not only the attorney for the class and be awarded a fee for his representation, he seeks in the same action, personal relief. The practice involved does not seem to the Court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this Court or elsewhere. This case seems to involve a questionable method of soliciting legal business and such solicitation should not be encouraged. 56 F.R.D. at 589 n. 1.

In reversing the lower court's opinion on other grounds, this court stated on appeal:

> The requirements of section (a) of Rule 23 are satisfied as determined by the district court, *supra*, n. 4. The determination of subsection 4 of Rule 23(a) was not made explicitly in the court's opinion, but we note that Goldman's withdrawal as counsel in the case removed the judge's major objection to his acting as the representative party for the class.
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> 532 F.2d 10, 15 n. 6 (7th Cir. 1976), *cert. denied*, 429 U.S. 870, 97 S.Ct. 183, 50 L.Ed.2d 150.

ship in this case and plaintiff's 'ability and diligence to prosecute the suit as a class action.'" 547 F.2d at 186. Although declining to adopt a per se rule prohibiting class representation under the circumstances of the case, the court on appeal found that the district judge had not abused his discretion in denying class certification:

> On the issue of class representation, district courts in this circuit have expressed concern over the propriety of a law partner relationship between the attorney for the class and its representative, but they have not invariably refused to certify the class when the relationship exists. Compare *Stull v. Baker* [1973 Transfer Binder] CCH Fed.Sec.L.Rep. ¶94,227, at 94,929 (S.D.N.Y.1973), with *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y.1972). And we have not yet ruled on whether, as appellee suggests here, there should be a per se rule prohibiting the practice. See *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976); Note, Developments in the Law–Class Actions, 89 Harv.L.Rev. 1318, 1577-86, 1585 n. 29 (1976).
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> We do not think that this is a proper case for fuller consideration of these issues. It is clear from the record before us that Judge MacMahon did not abuse his discretion in denying class certification. Moreover, we note that his decision does not bar class certification with another person representing the class. Under the circumstances, we will assume arguendo that the order is appealable and affirm the district court, leaving to another day fuller discussion of the issues presented here.
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> 547 F.2d at 186-7 (footnotes omitted).

Of the four named plaintiffs in *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976), "three are attorneys with the law firm of counsel and the fourth is the wife of one of them." 531 F.2d at 1360. The court ruled that the relationship between plaintiff and counsel created an inherent conflict which prohibited plaintiffs from adequately protecting the interests of the class. For purposes of determining the

adequacy of representation, the court treated plaintiffs who were members of the law firm of counsel or a spouse of a member of the law firm as being the same "person" as counsel:

> The Turoffs do not have standing to represent the class of May charge account customers similarly situated. Of the four named plaintiffs, three are attorneys with the law firm of counsel and the fourth is the wife of one of them. Rule 23(a)(4) of the Federal Rules of Civil Procedure provides that a representative party must "fairly and adequately protect the interests of the class." For the same individual to attempt representation of the class as plaintiff and as counsel presents an inherent conflict of interests. Because the financial recovery for reasonable attorney's fees would dwarf the individual's recovery as a member of the class herein, the financial interests of the named plaintiffs and of the class are not coextensive. If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representative and of class attorney cannot be played by the same person. See *Kriger v. European Health Spa, Inc., of Milwaukee, Wis.*, 56 F.R.D. 104 (E.D.Wis.1972); *Shields v. First National Bank of Arizona*, 56 F.R.D. 442 (D.Ariz.1972); *Shields v. Valley National Bank of Arizona*, 56 F.R.D. 448 (D.Ariz.1971); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y.1972); *Eovaldi v. First National Bank of Chicago*, 57 F.R.D. 545 (N.D.Ill.1972); *Graybeal v. American Savings & Loan Association*, 59 F.R.D. 7 (D.C.D.C.1973); *Berkman v. Sinclair Oil Corporation*, 59 F.R.D. 602 (N.D.Ill.1973); *Shibley v. Time, Inc.*, 40 Ohio Misc. 51, 321 N.E.2d 791 (Cuy.Co.C.P.1974); *Stull v. Pool*, 63 F.R.D. 702 (S.D.N.Y.1974).
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> 531 F.2d at 1360.

The court in *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir. 1976), ruled that the Code of Professional Responsibility requires that:

> . . . no member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fee award would be appropriate.

534 F.2d at 1093.[9]

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[9] The court in *Kramer* ruled that the district judge's order certifying the class action was unreviewable since it was an interlocutory order. The court held, however, that the district judge had erred in treating defendants' subsequent motion to disqualify plaintiffs' counsel merely as reargument of the certification question. The court stated:

> As previously rehearsed, page 1087 *supra*, in this case the district court treated the motion to disqualify counsel as a motion to reconsider the class action certification decision. The issue on certifying plaintiffs as class representatives—whether they would "fairly and adequately protect the interests of the class", F.R.Civ.P. 23(a)(4), when their counsel was an employee (and later a partner) in Kramer's firm—was related, but not identical, to the issue posed by the disqualification motion. Reducing the distinction to its bare essentials, the former issue relates to who may serve as class representative, while the latter relates to who may serve as counsel. The trial court failed to perceive the difference and consequently erred. 534 F.2d at 1088.

The court found that denial of the motion to disqualify plaintiffs' attorney was appealable under the collateral rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Although, as the court in *Kramer* pointed out, the disqualification motion does not raise an issue identical to a Rule 23(a)(4) question, the policy considerations expressed by the court in *Kramer* are equally applicable in the present case. Even though we find the policy considerations expressed in *Kramer* to be applicable to the present case, this court does not adopt the absolute approach utilized in that case.

According to the court, the notion that the appearance of conduct is as important as the conduct itself is a predicate for the Code of Professional Responsibility. Thus, ABA Canons of Professional Ethics No. 9 provides: "A lawyer should avoid even the appearance of professional impropriety." Under this standard, the court ruled that it is immaterial whether plaintiff has taken precautions to ensure that he will not benefit from attorney's fees or act as an attorney in the case. Similarly, neither plaintiff's motivation in bringing the suit nor the quality of legal representation afforded by counsel are relevant. On the contrary, the factor mandating judicial inquiry is the appearance of impropriety inherent in plaintiff's role as representative of class members interests vis-à-vis plaintiff's business associate's desire to maximize recovery of attorney's fees from an equitable fund created by the court for the benefit of the class. Since the public understands a partnership to provide for sharing profits and losses, the court concluded that "[e]soteric internal protections in writing or under oath, insulating the plaintiff-attorney partner from participating in a fee, can hardly dissipate the lay notion that action by one partner is action for the partnership." 534 F.2d at 1092.

Although the cases which have been referred to offer some support for a *per se* approach, this court declines to adopt a *per se* analysis. We find, however, that the district judge did not under the circumstances of this case abuse his discretion in ruling that plaintiffs are inadequate to act as class representatives.

In *Microdot*, the joint membership of Arnold M. Flamm and Arthur T. Susman in the same law firm renders Arnold Flamm an inadequate class representative. First, the likelihood of a conflict of interest exists between Flamm's assertion of class interests and his interest in attorney's fees which might be awarded to his law firm. Although Flamm has filed an affidavit stating that he has waived

his interest in fees which might be awarded to his law firm, defendants argued before the district court and contend on appeal that Flamm's waiver of interest in attorney's fees is not possible under the Professional Service Corporation Act, Ill.Rev.Stat. ch. 32, § 415-1, *et seq.* Plaintiffs failed to respond to this point either before the district judge or on appeal. Even if plaintiff's waiver is effective, plaintiff retains both pecuniary and non-pecuniary interests in an award of attorney's fees to his law firm which would support a finding of a likelihood of a conflict of interest.[10] For example, the value of stock held by Flamm in Prins, Flamm and Susman, Ltd., might increase if the law firm

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[10] We find that *Kesselhaut v. United States,* 555 F.2d 791 (Ct.Cl.1977), a case submitted to this court by plaintiffs pursuant to Circuit Rule 11, is distinguishable from the present case. In *Kesselhaut,* the trial judge disqualified the law firm of Krooth and Altman from representing plaintiffs because A. M. Prothro, an attorney working for the law firm who had recently retired as General Counsel of the FHA, had come into contact with plaintiffs' lawsuit before he left the FHA. Prothro was not a partner in Krooth and Altman. He initially received a straight salary and later was paid hourly compensation for part-time work. Prothro disqualified himself from all contacts with the lawsuit and expected to retire prior to the time when plaintiffs' case would come to trial. On the basis of these facts, the Court of Claims, sitting en banc, reversed the trial judge's decision. The court ruled that disqualification of an entire law firm because of the prior involvement of one of its members when serving as a government attorney was too inflexible a rule. The primary policy consideration relied upon by the court was that an inflexible disqualification of an entire law firm "would act as a strong deterrent to the acceptance of Government employment by the most promising class of young lawyers." At 793.

The policy consideration relied upon by the court in *Kesselhaut* is not applicable to the case now before this court. In addition, the decision in *Kesselhaut* was made in a nonclass action context free from the requirements imposed by Rule 23(a)(4) and the due process clause in a class action context. We therefore conclude that *Kesselhaut* does not control our decision in the present case.

received a large recovery for attorney's fees. In addition, plaintiff also retains an interest in the reputation and good will of his law firm which would be enhanced by a large attorney's fee award. See *SCA Services, Inc. v. Hon. Robert D. Morgan, Judge, United States District Court for the Southern District of Illinois, et al.*, No. 77-1194, 557 F.2d 110, 115 (7 Cir. 1977). Thus, we agree with the district judge that under these circumstances the likelihood of a conflict of interest justifies denial of class certification.[11] As the court stated in *Turoff*, 531 F.2d at 1360:

> Because the financial recovery for reasonable attorney's fees would dwarf the individual's recovery as a member of the class herein, the financial interests of the named plaintiffs and of the class are not coextensive. If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representative and class attorney cannot be played by the same person.

We also find that this possible conflict of interest must be considered in conjunction with public perception that

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[11] Plaintiffs argue that an actual conflict of interest must be shown to support a finding that the requirements of Rule 23(a)(4) have not been met. While "mere imaginative speculation" is not enough, *Robertson v. National Basketball Association*, 389 F.Supp. 867, 899 (S.D.N.Y.1975), the district court must assess the likelihood that a conflict of interest may exist. *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Swain v. Brinegar*, 517 F.2d 766, 780 (7th Cir. 1975); *Phillips v. Klassen*, 163 U.S.App.D.C. 360, 502 F.2d 362, 366 (1974), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269; *Cullen v. United States*, 372 F.Supp. 441, 448 (N.D.Ill.1974). We believe that the likelihood of a conflict of interest exists where the class representative's possible recovery is far outweighed by attorney's fees which might be awarded to a law firm in which he is a member. That relationship raises an inherent conflict of interest. See *Turoff*, 531 F.2d at 1360.

plaintiff shares in attorney's fees won by his law firm. As the court in *Kramer*, 534 F.2d at 1092, noted, "esoteric internal protections" preventing an attorney from sharing in fees awarded to his law firm do not dissipate the public's perception that plaintiff would in fact receive benefit from fees awarded to his law firm.[12] Thus, policy considerations expressed by the court in *Kramer, supra*, which have their roots in ABA Canons of Professional Ethics No. 9, also support the lower court's decision.[13]

We find for similar reasons that the district court properly concluded in *Lincoln American* that Michael Susman is under the circumstances an inadequate class representative. Michael Susman's possible recovery as plaintiff is dwarfed by attorney's fees which could be awarded to his

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[12] We do not believe that the analysis in *Kramer* is rendered inapplicable to the present case by the fact that plaintiff's law firm is organized as a professional service corporation rather than as a partnership. The court in *Kramer*, 534 F.2d at 1093, included professional service corporations within the scope of its holding.

[13] Plaintiffs rely on *International Electronics Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975), for the proposition that in the absence of a violation of one of the provisions in Canons 1 through 8, Canon 9's caveat cannot be independently relied upon. Plaintiffs have, however, misread *Flanzer*. The court in *Flanzer* only cautioned against indiscriminate application of Canon 9 where the facts do not fit within Canons 1-8. The court did not set forth an inflexible prohibition on the independent use of Canon 9. The court stated:

> From what we have said, it must be clear that we do not think the question of "appearances" under Canon 9 is particularly acute in this case. We caution, as the Connecticut Bar Association urges us to do, that Canon 9, though there are occasions when it should be applied, should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules. 527 F.2d at 1295.

brother as class counsel. As the district judge stated:

> Even though plaintiff does not expect to share in any attorney's fees recovered in this cause, there exists the possibility that one so situated will become more interested in maximizing the "return" to his counsel than in aggressively presenting the proposed class' action.

In addition, the likelihood of a conflict of interest is also supported by "the natural assumption that brothers enjoy a close personal and family relationship and, consequently, would be inclined to support each other's interests." *SCA Services, Inc.*, No. 77-1194, at 116.[14]

Plaintiffs' relationship to Mr. Meites raises similar considerations. The fact that an individual rents office space from a law firm does not by itself render a member of that firm or a relative of a member of that firm an inadequate class representative. On the contrary, a court must examine the circumstances of each case. The district court's ruling which was based on the interdependence between Mr. Meites and the law firm of Prins, Flamm and Susman, Ltd., cannot be said to be an abuse of discretion.

We do not accept under the circumstances of this case plaintiffs' argument that reliance on the court's control of settlement and attorney's fees renders strict enforcement of the requirements of Rule 23(a)(4) unnecessary. Nor do we under the present circumstances agree with plaintiffs that a realistic approach to ensuring protection of absent class members' interests places principal reliance on class counsel and the court. Both Rule 23(a)(4) and

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[14] We also agree with the district court that Ann Flamm is not by herself an adequate class representative. As the district court pointed out, Ann Flamm is also subject to a conflict of interest analysis because of her relationship as the mother of Arnold Flamm. In addition, the district court found that Ms. Flamm as co-trustee could not have brought this suit without also joining her son as plaintiff.

the due process clause require that representative parties adequately protect the interests of absent class members. The entire process of adjudication which is comprised of the class representative, class counsel, and the trial judge must ensure adequacy of representation. *National Ass'n of Regional Medical Programs*, 551 F.2d at 346; Developments in the Law—Class Actions, 89 Harv.L.Rev. 1321, 1410-11 (1976).[15] We find that the district judge was acting well within his discretion in strictly applying the requirements of Rule 23(a)(4) where the close relationship between plaintiff and counsel creates an inherent conflict of interest. We note, however, that judicial control over class settlements and attorney's fees might, under other circumstances, provide adequate protection for the due process rights of absent class members.

As the district judge noted, plaintiffs are free to seek different counsel and thereby dispel any possibility of a conflict of interest. In lieu of a change in counsel which might result in a certification of the class actions, plaintiffs are not barred from continuing the lawsuits on their own behalf.

By holding as we do in this case we intend no adverse reflection whatsoever, either professionally or personally, upon the individual counsel involved.

For the foregoing reasons, the rulings by the district judge in the two cases now before this court are hereby affirmed.

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[15] Citing state court cases where fiduciaries in non-class action contexts were allowed to either act as attorney or employ a member of the fiduciaries' law firm as an attorney, plaintiffs urge that a similar rule be applied to class representatives. The cases cited by plaintiffs are, however, inapposite to the present case. Strict application of the adequacy of representation requirement is mandated by due process considerations since absent class members will be bound by the court's judgment. Similar considerations were not raised in the cases cited by plaintiffs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM,
Plaintiffs,

v.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants.

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MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This case was filed as a class action asserting claims under the Securities Exchange Act of 1934, §§ 10(b), 14(e), 15 U.S.C. §§ 78j(b), n(e). In an opinion dated October 19, 1976, this court issued a ruling denying plaintiffs' motion for class certification because of plaintiffs' failure to meet the requirements of Fed. R. Civ. P. 23(a)(4). *Flamm v. Eberstadt*, 72 F.R.D. 187 (N.D. Ill. 1976). Thereupon, this court, pursuant to 28 U.S.C. § 1292(b), certified the issue of whether plaintiffs' were adequate representatives of the class they sought to represent to the court of appeals, and on January 25, 1977 that court granted plaintiffs' permission to appeal. In an opinion dated August 31, 1977, the Seventh Circuit affirmed this court's ruling denying plaintiffs' motion for class certification. *Susman v. Lincoln American Corp.*, No. 77-1145 (7th Cir. August 31, 1977).[1]

Plaintiffs' have again moved for class certification stating that the reason this court found them to be inadequate

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[1] This court had certified the *Flamm* case and the *Susman* case for purposes of an interlocatory appeal since they both involved the same class action issue.

class representatives no longer exists and class certification is appropriate at this time. However, before the briefing on this question was completed and this court could rule on plaintiffs' motion, defendants, in a letter dated November 1, 1977, tendered[2] to plaintiffs the amount of money they claimed they had been individually deprived of by defendants' actions as alleged in the instant complaint. Defendants have now moved to dismiss plaintiffs' complaint on the ground of mootness arguing that there does not exist at this time a justicable, Article III of the Constitution "case or controversy" between plaintiffs and defendants. Thus, defendants argue that since plaintiffs have obtained all the relief they seek to obtain from this lawsuit it would be a waste of judicial energy, as well as a violation of the constitutional prohibition against courts rendering advisory opinions, to allow this case to continue. For this proposition defendants primarily rely on the recent decision in *Winokur v. Bell Federal Sav. & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977). After reviewing the briefs submitted by the parties, this court is compelled to grant defendants' motion because of the Seventh Circuit's ruling in *Winokur*, and accordingly this cause is dismissed.

In opposition to defendants' motion, plaintiffs present two arguments. First, plaintiffs rely on a line of cases starting with *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), which hold that the "mere voluntary cessation of allegedly illegal conduct does not moot a case." *Burbank v. Twomey*, 520 F.2d 744, 747 (7th Cir. 1975). Plaintiffs argue from this proposition that defendants, by tendering

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[2] Although the plaintiffs challenge the adequacy of defendants' tender for several reasons, this court finds the letter to plaintiffs to constitute a valid tender to end the controversy between the named plaintiffs and defendants. *See, e.g.*, Guthrie v. Curnutt, 417 F.2d 764 (10th Cir. 1969); Martindell v. Lake Shore Nat'l Bank, 15 Ill. App. 2d 217, 145 N.E. 2d 784 (1957), *rev'd on other grounds*, 15 Ill. 2d 272, 154 N.E. 2d 683 (1958).

to plaintiffs the amount of their individual claims, cannot moot this action by their own voluntary acts. This analysis, however, is incorrect. As was recognized in *Winokur*, the doctrine as enunciated in *W. T. Grant* only applies if there is the possibility that the defendant will continue in the future to infringe upon plaintiff's rights. *Winokur v. Bell Federal Sav. & Loan Ass'n*, 560 F.2d 271, 274 (7th Cir. 1977). Since plaintiffs do not seek injunctive relief in this cause, and since plaintiffs have not indicated that they fear that defendants will again injure them by way of further violations of the federal securities laws, plaintiffs' first argument based upon *W. T. Grant* and its progeny is without merit.

Plaintiffs' second argument, although more substantial in this court's view, is likewise without merit in light of *Winokur*. Plaintiffs argue that because they presently have pending a motion for class certification the mere fact that their individual claims may be moot does not render this action, as a class action, moot. Thus, plaintiffs rely on the limited exception to the mootness doctrine as applied to class actions delineated in *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975), and as applied by this and other courts. *See, e.g., Langson v. Simon*, 74 F.R.D. 456 (N.D. Ill. 1977) (Flaum, J.); *Custom v. Trainor*, 74 F.R.D. 413 (N.D. Ill. 1977) (Marshall, J.); *Robinson v. Leahy*, 73 F.R.D. 109 (N.D. Ill. 1977) (Flaum, J.).

In *Gerstein*, the Supreme Court was faced with an action by individuals who were in police custody for pretrial detention. The plaintiffs, seeking to represent a class of all persons subject to such pretrial detention who were not afforded preliminary hearings as to the charges levied against them, challenged their confinement as violative of due process of law. The Supreme Court, in reviewing the record before it, noted that the named plaintiffs had been convicted of the charges against them and were no longer in pretrial custody. Moreover, the court noted that the

record was not clear as to whether at the time the trial court granted plaintiffs' motion for class certification the named plaintiffs were still in pretrial detention and had a viable case or controversy with the defendants. *Gerstein v. Pugh*, 420 U.S. 110-11 n.11.

In considering whether the action was moot because the named plaintiffs' claims had been resolved, the Supreme Court stated that even if there had not been a live controversy between the named plaintiffs and defendants at the time the class certification motion was granted, the plaintiffs' action could continue to vindicate the rights of those the named plaintiffs sought to represent. Thus, the court stated that although as a general rule a named plaintiff must be a member of the class he seeks to represent at the time the class is certified, and must at that time have a live controversy with the defendant, in order for a class action to continue in light of the subsequent mootness of the named plaintiff's claim, *see Sosna v. Iowa*, 419 U.S. 393 (1975), an exception to this rule existed when: (1) the nature of the plaintiff's and the class' claims were such that the plaintiff would have suffered his injury before the court could rule on his motion for class certification; (2) it was certain that a constant class of persons suffering the deprivation existed; and (3) the attorney representing the named representative has other clients with a continuing live interest in the case, *i.e.*, a public defender. *Gerstein v. Pugh*, 420 U.S. at 111 n.11.

In the case at bar, plaintiffs argue that this action falls within the ambit of the *Gerstein* exception to the mootness doctrine and this court should rule that although the named plaintiffs' claims are moot this case should continue so as to vindicate the rights of the class the named plaintiffs seek to represent. Thus, plaintiffs argue that the unilateral action of defendants in tendering to the named plaintiffs the amount of their individual claims cannot be held to moot the class allegations because defendants will

thereupon be able to prevent a class from ever having its claims vindicated.

While this court recognizes the rule as delineated in *Gerstein*, and as noted previously has applied that rule under different circumstances, this court is bound by the holding of the Seventh Circuit in *Winokur*. In *Winokur*, plaintiffs' filed a federal securities class action in which they sought injunctive and monetary relief. Plaintiffs sought to have a class certified but the district court found that plaintiffs had not established the propriety of maintaining their action on a class-wide basis. Plaintiffs' request to have the issue certified to the court of appeals pursuant to 28 U.S.C. § 1292(b) was denied and plaintiffs were barred from appealing the denial of class status since such orders are not appealable in this circuit. *See Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972). Thereafter, defendant tendered to the named plaintiffs the amount of their individual claim and changed its policies to avoid creating the same difficulties from arising again. This court[3] thereupon dismissed the action as moot stating that no case or controversy existed between the named plaintiffs and defendant in light of the fact that class certification had been denied.

The court of appeals affirmed the order of dismissal. *Winokur v. Bell Federal Savings & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977). However, more importantly for the issues before the court in the case at bar, the court of appeals also held that it lacked jurisdiction to consider whether the district court had erred in denying class certification. Thus, plaintiffs' in *Winokur* argued that had the district court certified the class they sought to represent their action would not be moot even in light of defendant's tender. The court of appeals, plaintiffs argued, was there-

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[3]This court was transferred the *Winokur* case after the denial of class certification.

fore required to consider plaintiffs' request for class certification since plaintiffs' were not allowed to appeal the denial of their class motion previously. The Seventh Circuit rejected this argument stating the rule of law applicable to the case at bar as:

> When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.

It is clear to this court that the facts of this case, although different in minor respects, falls squarely within the ambit of the *Winokur* holding. Thus, as in *Winokur*, plaintiffs herein have had their motion for class certification denied and in fact this denial was affirmed. Defendants have tendered the named plaintiffs the amount of their individual claims and there is presently no case or controversy between them. The fact that their is presently pending a motion for class certification does not make this case different from *Winokur* since this is exactly the same as having an appeal before the court of appeals seeking a review of a class action motion denial.

Plaintiffs argue, however, that this court should not apply the *Winokur* case to their class action claims for several reasons. First, plaintiffs argue *Winokur* involved appellate review and the case at bar is still in the district court. While this is a difference, as stated above, it is not material. When an action becomes moot it ousts the court in which it is pending of jurisdiction to consider any other matters in that case. If the court of appeals felt itself barred by Article III to consider the propriety of class certification in *Winokur*, this court is no less barred from considering plaintiffs' renewed motion for class certification.

Second, plaintiffs argue that this court should treat its renewed motion for class certification as a motion to

"reconsider" the prior denial of class certification. This, plaintiffs argue, would allow this court to make the granting of the class motion now "relate back" to the previous denial and would prevent any mooting of plaintiffs' class claims. However, this argument is simply a restatement of the plaintiffs' first argument and for the same reasons as previously mentioned must be rejected.

Finally, plaintiffs argue that *Winokur* is wrongly decided. Thus, plaintiffs argue that the rule stated in *Winokur* and previously quoted in this opinion is directly in conflict with the holding in *Gerstein* that class actions can be certified in certain cases where the named plaintiffs' claims are mooted prior to certification. However, whatever the merits of this argument, plaintiffs position must fail in this district court which is bound by the pronouncements of its court of appeals. This court recognizes that other courts, unlike the Seventh Circuit, have reviewed denials of class certifications after plaintiff's claims have been mooted, *see, e.g., Cameron v. E. M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976); *but see Napier v. Gertrude*, 542 F.2d 825 (10th Cir. 1976), *cert. denied*, 97 S.Ct. 759 (1977). Moreover, this court notes that the Seventh Circuit did not cite *Gerstein* in its opinion in *Winokur* although it did cite cases decided after that decision.[4] Nevertheless, this court cannot say that the court of appeals did not consider *Gerstein* and finds its principles inapplicable to the case at bar. It is possible that the court of appeals was of the opinion that the *Gerstein* exception did not apply in class actions to be certified under Fed. R. Civ. P. 23(b) (3) since it is not likely that defendants would repeat their illegal activity. Or perhaps the court decided that private class action attorneys did not meet the *Gerstein* require-

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[4] In fact, the court in *Winokur* cited Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975), the decision in volume 420 of the United States Supreme Court Reports which immediately follows *Gerstein*.

ment of class action counsel who had clients like the named plaintiffs interested in the vindication of the class' rights. Hence, whatever the court of appeals' reasons, *Winokur* is decided and its mandate must be obeyed.

Accordingly, this court must declare plaintiffs' action moot. The issues raised by plaintiffs concerning the problems of maintaining a class action when the defendants have the ability to moot the case must be resolved by the court of appeals in light of *Winokur*. On its facts this action is identical to *Winokur* and it must be dismissed.

It is so ordered.

/s/ JOEL M. FLAUM
United States District Judge

Dated: December 30, 1977

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

Michael SUSMAN,
Plaintiff-Appellant,

v.

LINCOLN AMERICAN CORP. et al.,
Defendants-Appellees.

Ann FLAMM and Arnold FLAMM,
Plaintiffs-Appellants,

v.

Rudolph EBERSTADT, Jr. and MICRODOT, INC.,
Defendants-Appellees.

Nos. 78-1293, 78-1310.

Argued Sept. 14, 1978.

Decided Oct. 23, 1978.

As Amended Nov. 20, 1978.

Rehearing and Rehearing In Banc Denied Dec. 5, 1978.

Before FAIRCHILD, Chief Judge, and CUMMINGS and WOOD, Circuit Judges.

FAIRCHILD, Chief Judge.

This is the consolidated appeal from the dismissals of two class action complaints. The district court, relying on this court's decision in *Winokur v. Bell Federal Savings and Loan*, 560 F.2d 271 (7th Cir. 1977), dismissed both actions as moot after the defendants tendered to the named plaintiffs their full monetary damages. We limit the *Winokur* language relied on by the district court and reverse its decision in both cases. We remand for determination of the motions for class certification that were pending at the time of the dismissal. In the *Susman* case, the district

court also dismissed the plaintiff's derivative claims. We affirm that decision in part and reverse it in part.

In these cases, unlike *Winokur*, an appeal from the the denial for class certification was effected under 28 U.S.C. § 1292(b). The facts of both cases were discussed in our decision in that appeal on the issue of whether plaintiffs' counsel could fairly and adequately represent the classes sought to be certified. *Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977). The facts will not be repeated here. In the prior decision we affirmed the district court's denials of class certification on the grounds that the relationship between the named plaintiffs and their counsel could lead to a conflict of interest and noted

> "[P]laintiffs are free to seek different counsel and thereby dispel any possibility of a conflict of interest. In lieu of a change in counsel which might result in a certification of the class actions, plaintiffs are not barred from continuing the lawsuits on their own behalf." 561 F.2d 96.

Clearly we recognized potential further consideration of representation of the interests of class members by the named plaintiffs.

The plaintiffs in both cases sought and obtained new counsel. Renewed motions for class certification were then filed. While the renewed motions were pending the defendants tendered to the plaintiffs the amount of money they claimed to have lost as a result of the defendants' actions plus properly chargeable costs. The offers, which were made without admissions of liability by the defendants, and which were clearly made in an attempt to render the cases moot, were refused by the plaintiffs. Nevertheless, the district court held that the defendants' offers extinguished the controversies between the parties and that as a result the court no longer had jurisdiction to decide the motions for class certification. In the *Susman* case, the district court also dismissed the plaintiff 's derivative claims.

THE CLASS ACTION

The Article III requirement that the federal courts decide only issues where there is an actual case or controversy between the parties is fundamental to our judicial system. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). The jurisdictional ban on making any decisions in moot cases (or, for that matter, in reviewing decisions already made) arises from this constitutional requirement. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3, 84 S.Ct. 341, 11 L.Ed.2d 347 (1964); *Powell v. McCormack*, 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Yet a number of cases have been decided on the merits despite assertions that the original wrong complained of had been corrected, that the original plaintiff would no longer be affected by the outcome of the lawsuit, or that other changes in the underlying factual situation rendered the case moot. *See, e. g., United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1503 (1953) (corporate director resigned from interlocking directorates which were subject of the complaint); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968) (ten day injunction complained of had expired two years previously); *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911) (ICC order under attack had expired by its own terms); *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (plaintiff had obtained the divorce she was seeking in another state). It is not necessary in this decision to discuss the variety of exceptions to the mootness doctrine that may be available in various cases.[1] What are important, here, however, as in *Winokur* are those cases which involve class action complaints.

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[1] There is an extensive discussion of the current state of the mootness doctrine in *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978).

In *Winokur* we were directly concerned with the question whether the right to appellate review of a denial of class certification could survive the death of the controversy. We held it could not. Our present case is different, and does not present that question. In *Winokur*, however, we set forth several generalizations, including

> 2. When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action. 560 F.2d 277.

This generalization literally applies to our instant case because at the critical moment there had been no determination that the action be maintained as a class action. We think, however, that our instant case differs significantly from *Winokur* and from *Board of School Comm'rs v. Jacobs*, 420 U.S. 129, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975), on which we relied in *Winokur*. Here, at the critical moment, the question of maintaining the class action had been freshly raised, consistently with the suggestion of the appellate court that it could be reopened after a change in counsel.

We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole. We limit the language of generalization No. 2 in *Winokur* accordingly.[2]

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[2] It would be arguable, on the same theory, that a complaint with class action allegations sufficiently brings the interests of the class members before the court, at least where the court proceeds with reasonable promptness to reach the issue of class

(Footnote continued on the following page)

Courts have consistently recognized that unnamed class members have an interest in lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf. Thus, potential class members are given the opportunity to support or oppose class certification or to challenge the adequacy of representation by the named plaintiff. *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420 (3rd Cir. 1968). The statute of limitations on their individual causes of action may be tolled from the date of filing of the class action complaint. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). They may also have a right to be informed of, or even included in, a settlement that occurs prior to class certification. *Kahan v. Rosensteil*, 424 F.2d 161, 169 (3rd Cir.), *cert. denied*, 398 U.S. 950, 90 S.Ct. 1870, 25 L.Ed.2d 290 (1970). Thus, at least in a limited sense, the interests of the unnamed class members are before the court during the pendency of a motion for class certification.

Normally, however, a class action must be certified as such in order for it to escape dismissal once the claims of the named plaintiff become moot. *Franks v. Bowman Transportation*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Sosna v. Iowa*, 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). But the courts have recognized that an absolute requirement would prevent some otherwise justiciable claims from ever being subject to judicial review. Thus, in *Sosna*, the Supreme Court said

> "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the cer-

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2 *(Continued)*

action maintenance. We do not need to reach that question. See footnote 4 *infra*.

> tification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." 419 U.S. 393, 402 n. 11, 95 S.Ct. at 559.

Clearly the Court had in mind situations where the nature of the complaint was such that the mere passage of time would usually make the individual plaintiff's complaint moot before a court could reasonably be expected to rule on a certification motion. And in practice that is how the "relation back" doctrine has been applied. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). We do not have such a situation here. But, just as necessity required the development of the relation back doctrine in cases where the underlying factual situation naturally changes so rapidly that the courts cannot keep up, so necessity compels a similar result here. If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification. If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.

We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. The district court has jurisdiction to consider the motion for class certification and should hear and decide that motion prior to deciding whether or not the case is mooted by the tender. This does not mean that the district court should ignore the fact that a tender has been made. The tender may raise a question, on which we now express no opinion, as to the named plaintiffs' ability to fairly and adequately rep-

resent the class.[3] But the class certification issues should be addressed by the district court prior to dismissals of the lawsuits. We express no opinion on the appropriate decisions on the issues.

We acknowledge the conflict between this decision and that of the Eighth Circuit in *Bradley v. Housing Authority of Kansas City, Missouri*, 512 F.2d 626 (8th Cir. 1975). We believe, however, that the result we have reached here is consistent with Article III, since in fact there will be no adjudication of the merits of the lawsuit unless there is first a determination that there are adversary parties and that the requirements of justiciability are present. *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978). Our decision in these cases is also consistent with the recent decision of the Court of Appeals for the Fifth Circuit in *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), which contained this language

> The notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. . . . By the very action of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. 578 F.2d 1106, 1110.[4]

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[3] See *Kuahulu v. Employers Insurance of Wausau*, 557 F.2d 1334 (9th Cir. 1977); *Roper v. Consurve*, 578 F.2d 1106 (5th Cir. 1978); *Banks v. Multi-Family Management, Inc.*, 554 F.2d 127 (4th Cir. 1977); and generally, H. Newberg, Newberg on Class Actions §§ 1085-1092.

[4] The Fifth Circuit has held that the very filing of a class action complaint places the plaintiff in a representative capacity, even if no motion for certification has been filed or even if class

(Footnote continued on the following page)

Finally, although the recent decisions of the Ninth Circuit in *Kuahulu v. Employers Insurance of Wausau*, 557 F.2d 1334 (177) and the Third Circuit in *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (1978) both involved factually distinct situations, their emphasis, like that in *Sosna*, on evaluating claims of mootness in light of the idiosyncrasies of each individual case is consistent with the approach we have used here.

THE DERIVATIVE CLAIMS

The district court dismissed the plaintiff Susman's derivative claims against Lincoln American corporate defendants and the individual defendants on the grounds that

> "Since plaintiff does not seek recession [sic] of the alleged illegal merger, once the merger took place plaintiffs lost the ability to sue derivatively. *See Voege v. Ackerman*, 364 F.Supp. 72, 74 (S.D.N.Y.1973); *Basch v. Talley Indus., Inc.*, 53 F.R.D. 9, 11-12 (S.D.N.Y.1971); *Heit v. Tenneco, Inc.*, 319 F.Supp. 884, 887-88 (D.Del.1970)."
>
> No. 73 C 1089 (N.D.Ill., Filed January 27, 1978)

The plaintiff contends that this ruling is in error since it involved the application of state rather than federal law and that even if state law is controlling, it was misapplied on the facts of the plaintiff's case. All of the parties have referred to Delaware law as the law to be applied to the extent that state law is controlling.

We do not need to address the plaintiff's assertion that federal rather than state law should apply in determining the capacity of a shareholder to bring a suit under the

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4 *(Continued)*

certification has been denied. (See cases cited in *Roper*.) Our decision today is limited to the fairly narrow situation where a motion for certification has been pursued with reasonable diligence and is pending when a tender is made.

federal securities laws on behalf of a corporation that has been merged with a defendant corporation subsequent to the filing of the complaint since it is clear that the derivative claims asserted by the plaintiff are founded solely on state law.[5] Nor do federal equitable considerations come into play, since the plaintiff did not attempt to enjoin the merger and is not now seeking rescission—in contrast to the situation we were presented with in *Ramsburg v. American Investment Co. of Ill.*, 231 F.2d 333 (7th Cir. 1956). The only question, then, is whether under Delaware law the plaintiff may maintain this derivative suit.

Delaware law is quite clear in stating that a derivative suit seeking only money damages brought on behalf of one corporation and against another cannot survive the merger of those two corporations regardless of whether the suit was filed before or after the merger took place. *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del.Sup.Ct.1970) The dismissal of the derivative suit against Lincoln American Life Insurance Company, the surviving corporation, must

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[5] Paragraph 10 of the plaintiff's amended complaint sets forth specific allegations of improper activity by the defendants. Paragraph 11 recites that "The foregoing acts of defendants constitute deceptive devices, a scheme to defraud and misstatements and omissions to state material facts in connection with the purchase and sale of securities and in connection with the solicitation of proxies *to the detriment of minority shareholders and are violative of* Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78j(b)), and the rules promulgated by the Securities Exchange Commission thereunder, including Rule 10B-5" (Emphasis added.) Paragraph 12, in contrast, says "The foregoing also constitute a breach *of common law to the detriment of Consumers* and its minority shareholders in that: . . . " (Emphasis added.) The contrast between these two paragraphs clearly indicates that the federal claims are brought only on behalf of the minority shareholders (whom plaintiff seeks to represent in a class action), while the common law claims are brought both on behalf of the minority shareholders, and, derivatively on behalf of Consumers National.

therefore be affirmed.

Slightly more difficult is the question of whether the derivative suit can be maintained against third parties, even if it must be dismissed as against the surviving corporation. The Lincoln American defendants urge us to adopt the "common sense" approach of *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2nd Cir. 1967) which noted the meaninglessness of a derivative action brought on behalf of a nonexistent corporation. But in *Bokat* the Delaware Supreme Court, after dismissing the derivative claim against the surviving corporation, explicitly said

> "This conclusion, however, does not mean that the claims asserted against the individual defendants, among them J. Paul Getty, have likewise been made moot. Such is not the case." 262 A.2d at 250.

Although this statement in *Bokat* was dictum (the individual claims were barred by the statute of limitations) it was made by the Delaware Supreme Court in a case subsequent to, and indeed citing the *Vine* case relied on by Lincoln American. It must, therefore, carry more weight in this case where we must apply Delaware law.

The cited language in *Bokat* has been analyzed at some length in a decision of the United States District Court for the Southern District of New York. *Abrams v. Occidental Petroleum Corp.*, 20 Fed. Rules Serv.2d 170 (S.D.N.Y.1975) (interpreting California and Delaware law). Judge Palmieri concluded that the *Bokat* language was an attempt to reconcile the savings clause of 8 Del.Code § 261 with the anomalous situation of a corporation suing itself. Therefore, he reasoned, a derivative suit begun by a shareholder against third parties prior to a merger could be continued after the merger (because of § 261) but that a similar suit brought against what was to become the surviving corporation must be dismissed after the merger to prevent the incongruous situation of a corporation suing itself. 20 Fed.Rules Serv.2d at 175.

We cannot disregard the clear language of the Delaware Supreme Court. We hold, therefore, that while the dismissal of the derivative claims against Lincoln American Life Insurance Company must be affirmed, the dismissal of those same claims against the third-party defendants must be reversed.

Insofar as the judgments appealed from dismissed the actions as moot without considering the questions of certification, and insofar as the judgment in No. 78-1293 dismissed the derivative action against parties other than Lincoln American Life Insurance Company, they are reversed and the causes remanded for further proceedings consistent with this opinion. In all other respects they are affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM, *Plaintiffs,* *v.* **RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,** *Defendants.*	76 C 427

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter comes before the court on plaintiffs' renewed motion for plaintiff class certification pursuant to Fed. R. Civ. P. 23(c). For the reasons stated below, the motion is granted.

The motion has been before the court once before. Class certification was denied because the relationship between plaintiffs and their counsel might have led to a conflict of interest contrary to the dictates of Fed. R. Civ. P. 23(a)(4). This ruling was affirmed. *Susman v. Lincoln Am. Corp.*, 561 F.2d 86 (7th Cir. 1977) (*Susman I*). After retaining new counsel, plaintiffs' renewed their motion. While the matter was pending, defendants tendered to plaintiffs the amount of money they individually claimed. Because of that tender and on defendants' motion to dismiss, the court ruled that the case between the named parties was moot and the action was dismissed. This decision was reversed, *Susman v. Lincoln Am. Corp.*, 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980) (*Susman II*), so the class certification issue is again ready for disposition.

The complaint generally alleges that defendants made material false misstatements or omissions in connection

with the sale of Microdot, Inc. common stock during the pendency of a tender offer by General Cable Corp., in violation of sections 10(b) and 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and n(e). The named plaintiffs are co-trustees of a trust which purchased and sold shares of Microdot stock in the relevant period. They seek to represent a class composed of:

> All sellers of common stock of Microdot, Inc. during the period beginning on December 5, 1975 and ending at the close of business on January 23, 1976, excluding the defendants and those in concert with them.

Plaintiffs complain that defendants issued a series of misstatements or omissions which: stated falsely an ideological opposition to all tender offers; omitted the fact that simultaneous to the General Cable tender offer and defendants' opposition to it, defendants were seeking a friendly takeover offer; and failed to disclose Microdot's cash and short-term investments, which made Microdot's financial position more favorable than previous statements had indicated. Four exhibits form the basis of the complaint. Exhibit A is a letter and press release from defendant Eberstadt (President of Microdot) to Microdot shareholders. In the letter, Eberstadt informs the reader, *inter alia*, that the board of directors unanimously recommended a rejection of the General Cable offer. The press release indicates Microdot would employ all its resources to defeat the offer. Exhibit B is another letter from Eberstadt to shareholders. In that communication, the defendant expressed his negative views on the number of takeover offers of medium size American companies like Microdot.[1] Eberstadt also

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[1] Eberstadt's views were communicated in the letter dated December 11, 1975 (Exhibit B), where he stated (in part):

> If no successful growth company of medium size is able to resist the raids of large outsiders, there will be no way for

(Footnote continued on the following page)

suggested that the prime motive for General Cable's tender offer was the personal enrichment of General Cable's president. Exhibits C and D are two more letters from Eberstadt in which he continued to counsel shareholders against acceptance of General Cable's offer.

Defendants oppose certification of the class on three grounds. First, defendants contend plaintiffs cannot meet the commonality and predominance requirements of Fed. R. Civ. P. 23(a)(2) and (b)(3). They argue that in a case where several statements are relied on as the basis of the cause of action, there must be a material misrepresentation common to all the documents. Here, defendants submit that none of the documents contains the alleged aversion to all takeovers. They maintain that Eberstadt only expressed a stand against surprise, non-negotiated tender offers. Further, defendants contend that the alleged ideological aversion only appears in one document and is not a common thread through all the exhibits as required by *Gelman v. Westinghouse Elec. Corp.*, 73 F.R.D. 60 (W.D. Pa. 1976), *aff'd*, 612 F.2d 799 (3d Cir. 1980), and *Feldman v. Lipton*, 64 F.R.D. 539 (S.D.N.Y. 1974). Because of the sep-

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1 *(Continued)*

> American stockholders to realize the potential these growth companies represent. Then there will be no future IBM, no Xerox, no Polaroid. They will be choked off and smothered as soon as they start to show their real growth potential.

In the letter of January 5, 1976, (Exhibit D), Eberstadt said (in part):

> [Y]ou may have seen an advertisement reprinting a letter I wrote on December 12 to Chief Executive Officers of 524 American companies with sales between $100 million and $400 million urging them to oppose surprise, unnegotiated tender offers of the kind undertaken by General Cable. The response to that letter has been very encouraging. I'm enclosing a brochure which sets forth some of the responses I have received.

arate contents of each document, defendants argue unique issues of fact and law concerning reliance and materiality will predominate over any common issues.

Defendants' second argument opposing certification is based on the relationship of plaintiffs' claim to those of the putative class members. Defendants argue that the typicality and adequate representation requirements of Rule 23 (a)(3) and (4) necessitate a co-extensive interest among all members of the class. Co-extensiveness, defendants submit, requires a common objective and factual positions that are not inconsistent. Defendants contend that this class would contain members with inconsistent factual positions because it would include all sellers of Microdot stock even though they purchased after some of the alleged misstatements were made. Thus, defendants argue some of the putative class members made an investment decision both to purchase and to sell Microdot shares based upon the same alleged misstatements, while the other members only sold shares during the class period. This situation, defendants maintain, presents inconsistencies that are not permitted under Rule 23(a)(3) and (4).

Defendants final argument also relates to the issue of adequate representation in subsection (a)(4). Defendants urge that the substitution of counsel for the named plaintiffs has not completely eliminated the spector of conflict identified in *Susman I*. Defendants note that the new attorney's affidavit filed pursuant to Local Rule 39 does not expressly state that Mr. Susman and Mr. Meites do not have a continuing interest in any eventual attorney's fees. Therefore, defendants argue that there is no factual basis on which to conclude the Flamm plaintiffs no longer have an interest in the fees. Without that affirmative conclusion, defendants submit that the Flamms cannot be adequate representatives.

In determining whether a class should be certified in a securities case, Rule 23 must be liberally construed in

deference to a strong policy favoring class actions. *King v. Kansas City Southern Indus., Inc.*, 519 F.2d 20 (7th Cir. 1975); *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339 (N.D. Ill. 1978); *Helfand v. Cenco, Inc.*, 80 F.R.D. 1 (N.D. Ill. 1977). This liberal policy recognizes that private class actions can effectively deter corporate wrongdoing and encourage mandated disclosures. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Green v. Wolf Corp.*, 406 F.2d. 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) Additionally, of course, the class action provides a useful tool for individuals with small claims who would otherwise be unable to bear the costs of litigation. *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339 (N.D. Ill. 1978); *Helfand v. Cenco, Inc.*, 80 F.R.D. 1 (N.D. Ill. 1977).

Notwithstanding these general principles, plaintiffs still bear the burden of demonstrating compliance with the requirements of Rule 23. *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339 (N.D. Ill. 1978). Plaintiffs must first meet all the prerequisites of Rule 23 (a) and then demonstrate the propriety of a (b)(3) class. Throughout this consideration, no inquiry into the merits of the suit is permitted. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974).

At the time of briefing, the incomplete state of discovery did not permit a determination of the exact number of sellers of Microdot stock from December 5, 1975 to January 23, 1976. However, plaintiffs estimate there are thousands of sellers because Microdot had 3.6 million shares outstanding. Defendants assume without conceding that plaintiffs can in fact establish a sufficient number of similarly situated sellers making joinder impracticable. Therefore, the numerosity requirement of Rule 23 (a)(1) is considered met.

Under subsection (a)(2) of the Rule, plaintiffs must demonstrate that questions of law or fact are common to all members of the class. Plaintiffs have alleged that defen-

dants engaged in a common course of conduct and they argue the case comes within a line of cases recognizing that a common course of conduct presents common issues under (a)(2). *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339 (N.D. Ill. 1978). Defendants chose to argue this issue in conjunction with the predominance requirement of subsection (b)(3). Because the Rule specifically distinguishes separate requirements, the court will analyze them individually.

One of the cases on which defendants primarily rely did address the (a)(2) requirement separately. In *Feldman v. Lifton*, 64 F.R.D. 539 (S.D.N.Y. 1974), plaintiffs attempted to certify a class of purchasers over a ten-year period. Plaintiffs argued that their complaint alleged a course of conduct, including many fraudulent statements, designed to manipulate the market price of the stock and that therefore the commonality requirement was met. The court first reasoned that the plaintiffs must provide detailed proof of the specific fraudulent statements that constituted the common course of conduct. Otherwise, the court would be unable to determine whether a common thread of misrepresentations existed. Because the plaintiffs had provided only general allegations, the court concluded plaintiffs had failed in their burden of demonstrating common issues and the class was not certified.

This case is easily distinguished from *Feldman*. Plaintiffs have attached the documents on which they rely and the relevant class period is less than two months. Yet defendants contend that there is no common thread to the series of statements because none express an ideological opposition to tender offers. They characterize the statements as only opposing surprise, non-negotiated tender offers. However, such argument goes more to the merits of the issue of whether what was said was a misrepre-

sentation. That type of inquiry is inappropriate on this motion. In addition, opposition to the General Cable offer and the reasons therefor clearly form a common thread. Furthermore, plaintiffs' theory is also based on the nondisclosure of defendants' financial position and negotiations for a friendly takeover throughout the period of General Cable's offer. Clearly, the general issue of whether the public statements contain material misrepresentations or omissions is common to the class. This is all that is required of subsection (a)(2), even as interpreted in defendants' other principal case, *Gelman v. Westhinghouse Elec. Corp.*, 73 F.R.D. 60, 66 (W.D. Pa. 1976), *aff'd*, 612 F.2d 799 (3d Cir. 1980).

The typicality requirement of subsection (a)(3) is partially subsumed in the tests of adequate representation mandated by (a)(4). *Helfand v. Cenco, Inc.*, 80 F.R.D. 1, 6 (N.D. Ill. 1977). Defendants have also argued these two subsections in conjunction, claiming that the factual positions of class members would be inconsistent because of the different times at which they purchased Microdot stock. However, this court has previously used a separate two-part test for typicality which will be followed here. Under subsection (a)(3), the interest of the plaintiffs and the class cannot be antagonistic and there must be a common nucleus of operative fact underlying plaintiffs' claims and those of the class. *Hochschuler v. G. S. Searle & Co.*, 82 F.R.D. 339, 344 (N.D. Ill. 1978). In this case, a common nucleus of fact would clearly underlie all claims. Furthermore, even if some members of the class are considered to be in inconsistent positions, their interests would not be antagonistic. All members would attempt to prove each of defendant's statements to be material misrepresentations regardless of the date of purchase. Although later purchasers may present different reliance questions, the named plaintiffs' claims are not atypical of the class'.

The final prerequisite of adequate representation in

subsection (a)(4) triggers several issues here. Two are raised by defendants and one by the Seventh Circuit in *Susman II*. Defendants' first argument, referred to above, is that the plaintiffs' and class' claims would be based on inconsistent factual premises and therefore would not be coextensive. The purpose of requiring that the class representative's and the class' interests coincide (or that they be coextensive) is to ensurse that the named plaintiff will be sufficiently motivated to prove the claims of the class. Defendants' argument, that some class members' claims would be inconsistent because some purchased and sold relying on the same alleged misstatements and omissions, does not undermine plaintiffs' motivation to prove the class' claims that shares were sold in reliance upon material misrepresentations. The purported inconsistency might raise individual issues of reliance, but it does not render the Flamms inadequate representatives of the class.

Defendants' second argument under (a)(4) addresses the other component of the adequate representation requirement, the qualifications of counsel, which was the subject of *Susman I*. After concluding that the then counsel would be inappropriate, the Seventh Circuit stated the plaintiffs were "free to seek different counsel *and thereby dispel any possibility of a conflict of interest.*" 561 F.2d 86, 96 (7th Cir. 1977) (emphasis added). Defendants now contend that the mere substitution of counsel does not completely eliminate the specter of conflict because the current and prior counsel have not sufficiently disclosed the circumstances of their relationship. The court is not persuaded by this contention. The Seventh Circuit's language does not require any such affirmative demonstration or disclosure. In the absence of any other evidence that the relationship of current counsel and plaintiffs could lead to conflicts of interest, there is no basis for concluding that the class will not be adequately represented.

The final issue under Subsection (a)(4) was raised by

the Seventh Circuit in *Susman II*, but not addressed by either party on remand in this court. The Court of Appeals held that the defendants' tender of the amount claimed by the Flamms did not render the plaintiffs' claims moot, but it indicated the tender shifts the focus of inquiry to whether plaintiffs are adequate representatives. 587 F.2d 866, 870 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980). *See also United States Parole Com'n v. Geraghty*, 445 U.S. 388, 405-07 (1980), quoting *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). In *Sosna*, the class representative's individual claim was moot, but the Court concluded she was an adequate representative because there were no conflicting interests and the interests of the class had been competently urged throughout the litigation. These same reasons plus the additional factor that plaintiffs have refused defendants' tender lead the court to conclude that on the basis of the existing record the Flamms are adequate representatives.

Because plaintiffs have met all the prerequisites of Rule 23(a), the only remaining issue is whether the common issues of law or fact predominate over any questions affecting individual members of the class.[2] Most of defendants' argument on the predominance question was devoted to the contention that no common thread permeates the series of public statements. Since the court has rejected that assertion, defendants' only argument is that the several statements create individual questions of materiality and reliance that will predominate as they did in *Gelman v. Westinghouse Elec. Corp.*, 73 F.R.D. 60 (W.D. Pa. 1976), *aff'd*, 612 F.2d 799 (3d Cir. 1980). However, this same contention was presented and rejected in *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339, 349 (N.D. Ill. 1978)

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[2] Defendants have not argued that the class action is not superior to other available methods for the fair and efficient adjudication of the controversy. It clearly is if all other requirements are met.

and for the same reasons the argument is not controlling here.

In *Hochschuler*, the plaintiff's claim was based on a common course of conduct concealing information. In opposing class certification, the defendants argued that the alleged misrepresentations were accurate so that individual questions of plaintiffs' misconceptions were raised. Defendants also contended that individual issues of materiality, scienter, reliance and damages would predominate. However, this court concluded that "[w]here a common nucleus of fraud within several representations or omissions is alleged, the predominance question has been met." 82 F.R.D. 339, 349 (N.D. Ill. 1978). The court also found *Gelman* distinguishable as it does here: in *Gelman* the "plaintiff's claims were based not on a single or substantially constant misdeed, but rather on a changing fluctuating series of alleged events." 82 F.R.D. at 349 (citation omitted). For these reasons, plaintiffs' claims meet the predominance requirement of subsection (b)(3).[3]

Accordingly, this case shall be maintained as a class action on behalf of all sellers of common stock of Microdot, Inc. during the period beginning on December 5, 1975 and ending at the close of business on January 23, 1976, excluding the defendants and those in concert with them.

It is so ordered.

/s/ JOEL M. FLAUM
UNITED STATES DISTRICT JUDGE

DATED: July 22, 1981

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[3] Of course, under subsection (c)(1) of Rule 23, this class determination order may be altered or amended, if necessary, before a decision on the merits. Additionally, subsection (a)(4) permits division into subclasses if appropriate.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM, *Plaintiffs,* *v.* **RUDOLPH EBERSTADT, JR., and MICRODOT, INC.,** *Defendants.*	76 C 427

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter is before the court on defendants' motion to reconsider the court's order dated July 22, 1981, which granted plaintiffs' motion for class certification. For the reasons stated below, the motion to reconsider is denied.

The facts underlying this case are reported in several other opinions[1] and will not be repeated here. On this motion, defendants primarily contend that the named plaintiffs, Ann Flamm and Arnold M. Flamm, cannot fairly and adequately represent the class so the class should not have been certified.[2] The defendants first argue that plain-

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[1] Susman v. Lincoln Am. Corp., 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980) ("*Susman II*"); Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977) ("*Susman I*"); Flamm v. Eberstadt, No. 76 C 427, (N.D. Ill. July 22, 1981 and Dec. 30, 1977); Flamm v. Eberstadt, 72 F.R.D. 187 (N.D. Ill. 1976).

[2] Defendants also argue alternatively that if class certification is appropriate, the current class definition is too broad. However, as was indicated in the July 22, 1981 opinion, the class definition may be altered or amended, if necessary, before a decision on the merits.

tiffs have no standing to be class representatives because they no longer have individual causes of action. Defendants also submit that plaintiffs failed to prosecute this case for one and one-half years and, thus, apparently will not vigorously represent the class. Finally, defendants maintain that plaintiffs' status as trustees of the Irving H. Flamm trust ("Flamm trust") creates an impermissible conflict with their duties as class representatives and that in pursuing this lawsuit, plaintiffs have violated their fiduciary duties as trustees. The impermissable conflict is said to exist because plaintiffs as class representatives must diligently prosecute this case, while plaintiffs as trustees must protect the trust funds and avoid unnecessary expenses. Defendants also allege that Arnold M. Flamm violated his fiduciary duty as trustee when he and Ann Flamm initially retained a law firm in which Arnold M. Flamm had an interest and would thereby personally profit from fees the law firm might have recovered. Additionally, defendants allege that the plaintiffs have breached their duties as trustees by pursuing this case as a class action, which will require costs far beyond their possible individual recovery.

In response to this motion, plaintiffs argue that defendants have brought no new circumstances to the court's attention and that defendants are submitting arguments that have been rejected by this court and the Court of Appeals. Specifically, plaintiffs argue that defendants' standing argument is just a "verbal twist" of the mootness issue resolved by the Seventh Circuit in *Susman II*. In addition, plaintiffs maintain that they have a personal stake in the outcome of the litigation because they have refused defendants' tender and they are bearing the costs of the litigation. Further, plaintiffs argue they have diligently pursued this lawsuit which has been to the Sev-

enth Circuit twice.[3] Finally, plaintiffs contend that their status as trustees does not disqualify them as class representatives because their responsibilities as trustees and class representatives do not conflict and because Arnold M. Flamm is personally bearing the costs of the litigation so that no trust funds are being used.

In regard to the issue of whether plaintiffs have failed to prosecute this matter diligently, the court cannot find that plaintiffs have been dilatory to the detriment of the class. After defendants' petition for certiorari was denied in *Susman II*, the case was remanded to this court for renewed consideration of class certification. Because plaintiffs are not responsible for any delay, they are not inadequate representatives for lack of diligence. The court also finds unpersuasive defendant's argument that plaintiffs have conflicting duties as class representatives and as trustees of the Flamm trust. The plaintiffs' status as trustees does not of itself disqualify them as representatives of the class. *See Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339, 346 n.11 (N.D. Ill. 1978); *Seiden v. Nicholson*, 69 F.R.D. 681, 689 (N.D. Ill. 1976). Further, the court cannot find that the plaintiffs' first choice of counsel in this case constitutes a breach of fiduciary duty to the Flamm trust. Although the retention of that law firm created impermissable conflicts of interest for class certification with these plaintiffs as representatives, the issue was a developing one and had not been definitively resolved in this circuit.[4] Finally, plaintiffs have answered defendants' contention regarding the expenditure of trust funds

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[3] In *Susman II*, defendants also petitioned the Supreme Court for a writ of certiorari, but the petition was denied. 445 U.S. 942 (1980).

[4] Additionally, in *Susman I*, the Seventh Circuit noted that its decision was not intended as an adverse reflection, either professionally or personally, upon the counsel involved. 561 F.2d at 96.

by revealing that no trust funds have been or will be used in this litigation. Therefore, plaintiffs' status and conduct as trustees of the Flamm trust do not render them inadequate representatives.

Defendants' standing argument raises more difficult issues. This court previously concluded, relying on *Sosna v. Iowa*, 419 U.S. 393 (1975), that plaintiffs were adequate representatives because the existing record indicated that the interests of the class had been competently urged, the plaintiffs had refused defendants' tender of damages, and there were no conflicting interests between plaintiffs and the class. Defendants' ask the court to reconsider this conclusion for two reasons. First, they argue that *Sosna* should not have been relied on because in that case the class representative's individual claim became moot after the class had been certified, while in this case, the tender to plaintiffs occurred before class certification. Second, defendants argue that plaintiffs' individual claims are not only moot, but plaintiffs also no longer have any personal stake in the matter because Arnold M. Flamm is personally bearing the costs of the litigation. In responding to these issues, plaintiffs argue that Supreme Court decisions issued since *Sosna* have established that the timing of class certification is not determinative of the issue. Specifically, plaintiffs point to the following language of *United States Parole Com'n v. Geraghty*, 445 U.S. 388, 398 (1980): "Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a 'relation back' approach, clearly demonstrate that timing is not crucial." Plaintiffs also note that this relation back theory was relied on by the Seventh Circuit in this case in *Susman II*.

The references to the timing of the certification of a class in *Geraghty* and *Susman II* are not necessarily controlling here because the issue addressed in those cases is whether an Article III case or controversy exists, not whether a named plaintiff whose claim has been satisifed can be an adequate representative. Thus, although the teachings of *Geraghty* and *Susman II* are certainly relevant here, this court must also consider earlier case law in determining the adequacy of plaintiffs as class representatives. Defendants cite cases which hold that a plaintiff with no standing to raise the claim in the complaint cannot be an adequate class representative. Those decisions, however, were made in different factual contexts. In *Lavin v. Chicago Bd. of Educ.*, 73 F.R.D. 438 (N.D. Ill. 1977), a plaintiff who suffered no continuing injury and whose interest in the action was only monetary sought to represent a class seeking injunctive relief. The complaint sought relief in regard to certain high school regulations and at the time of the court's opinion, the plaintiff was no longer a high school student. The court determined that the plaintiff was an inadequate representative because the plaintiff's individual interests were not coextensive with the class' and they created a potential conflict. In this case, there is no conflict in terms of injunctive and monetary relief sought and the circumstances that changed the plaintiffs' position are quite different. Here, the defendants caused plaintiffs' claims to become moot; it was not the passage of time that placed plaintiffs in a different posture. *Johnson v. Teasdale*, 456 F. Supp. 1083 (W.D. Mo. 1978), is also distinguishable. In that case, the pro se complaint contained no allegations of personal injury or infringement of rights. Thus, the court concluded that the plaintiff had no standing to bring his individual claim and, therefore, he could not seek relief on behalf of a class. In this case, on the other hand, plaintiffs clearly had standing to bring this action on the basis of the allegations in the complaint. Their claims were extinguished only because of defendants' tender. Finally, in *Wofford v. Safeway Stores*,

Inc., 78 F.R.D. 460 (N.D. Calif. 1978), a proposed class representative in an employment discrimination suit who had judgment entered against him was rejected as a class representative because he was no longer a member of the putative class. However, in the present case, there has not been a judgment entered against plaintiffs and even if there had been a judgment entered, it would have been based on defendants' offer to make plaintiffs whole, not on a finding of no liability to the plaintiffs.[5]

The court finds the situation presented by this case sufficiently distinguishable from the above cases such that a defendant's tender of full damages to a proposed class representative does not alone render that plaintiff an inadequate representative. Ordinarily, a named plaintiff will retain a personal stake in a class action case even if the defendant has satisfied that plaintiff's individual claim. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 336-37 (1980). That personal stake is the potential to shift part of the cost of the litigation to other members of the putative class who will benefit if the class prevails. Thus, "a mootness artificially created by the defendant by making the named plaintiff whole", *Susman II*, 587 F.2d 866, 869 (7th Cir. 1978), does not extinguish the named plaintiff's interest in the action. In addition, but for the defendant's tender of full damages, the plaintiff's claims and interests would be the same as the remaining members of the putative class. Defendants should not be permitted to "pick off" proposed class representatives before the propriety of certification is resolved and thereby frustrate a class action otherwise appropriate, just as defendants should not be able to render a proposed class action moot by tendering

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[5] Defendants have relied on one other case, Britt v. McKenney, 529 F.2d 44 (1st Cir.), *cert. denied*, 429 U.S. 854 (1976), but the court deems it of questionable precedential value in light of Gerstein v. Pugh, 420 U.S. 103 (1975), and subsequent Supreme Court decisions discussed in this opinion.

full damages to the named plaintiff before the issue of certification is determined. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Susman II*, 587 F.2d 866, 870-71 (7th Cir. 1978), *quoting Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978). Therefore, the court concludes that a defendant's tender of damages to a proposed class representative before a motion for class certification is decided does not alone render that proposed class representative inadequate and the court's previous reliance on *Sosna v. Iowa*, 419 U.S. 393 (1975), was not inappropriate.

Defendants' second argument that plaintiffs are not adequate class representatives because of their lack of interest in this matter presents an issue not considered by the court before. In the round of briefs filed on this motion, plaintiffs revealed for the first time that they, as trustees, are not providing the funds to pursue this litigation.[6] Rather, Arnold M. Flamm is bearing those costs personally. Defendants argue that it is, thus, only Arnold M. Flamm who individually has a continuing personal stake in this litigation. Proceeding with that line of thought, defendants contend that since Arnold M. Flamm individually has not suffered the injury alleged in the amended complaint, he cannot be a member of the class nor can he represent it because his interests are not coextensive with the class'. In addition, defendants maintain that because the named plaintiffs have not incurred any costs or expenses and because they have been tendered their individually claimed damages, they no longer have any inter-

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[6] Plaintiffs have argued that a class should not be decertified unless it is clear changed circumstances make continued class action treatment improper. The personal assumption of costs by Arnold M. Flamm has been a fact in existence since 1976. It was not brought to the court's or defendants' attention previously, however.

est in the case and cannot represent the class.[7] Plaintiffs have not responded to these arguments because they were first made in defendants' final reply memorandum. However, it is clear from the plaintiffs' exhibit to their memorandum in response to this motion that the plaintiffs as trustees are not incurring any expenses in this lawsuit.

Adequate representation is a crucial due process requirement in any class action. *See In re General Motors Corp. Engine Interchange Lit.*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); *Helfand v. Cenco, Inc.*, 80 F.R.D. 1 (N.D. Ill. 1977). Thus, the court has a continuing duty to stringently examine the adequacy of representation by the named representatives. *Id.* As set forth in the July 22, 1981 opinion, one requirement of adequate representation is that a class representative's interests must be coextensive with the class' interests to ensure that the representative is sufficiently motivated to prove the claims of the class. In this case, the plaintiffs' interests are no longer precisely the same as other members of the class because the defendants have tendered to plaintiffs their individual damages. As discussed above though, such a tender and the concomitant mootness of plaintiffs' indi-

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[7] Defendants have also raised the issue of the propriety of a third party providing the funds to pursue a lawsuit. Two courts that have addressed the issue of a third party volunteering to pay the costs of litigation similar to this have taken different positions on the matter. *Compare* Norman v. Arcs Equities Corp., 72 F.R.D. 502 (S.D.N.Y. 1976) (individual offers to pay costs for plaintiff trust fund) *with* Kane Assoc. v. Clifford, 80 F.R.D. (E.D.N.Y. 1978) (trustee personally provides funds for suit in name of trustee). The *Norman* court reasoned that such an arrangement "smacks of Maintenance", 72 F.R.D. at 504, while the *Kane Assoc.* court reasoned that a trustee's personal assumption of costs created no conflict or impropriety because of the trustee's right and obligation to pursue his beneficiaries' claims. 80 F.R.D. at 410. In the circumstances of the present case, this court deems it appropriate to follow the reasoning of *Kane Assoc.*

vidual claims does not alone render them inadequate representatives because plaintiffs in that position ordinarily have a continuing personal stake in the action to ensure adequate representation of the class and because if the tender automatically rendered plaintiffs inadequate, defendants would be able to prevent unilaterally the maintenance of an otherwise appropriate class action. In addition, even though plaintiffs do not have a personal financial stake in the form of potential distribution of costs among class members because they have not incurred, nor will they incur, any expenses in this litigation, the plaintiffs have clearly demonstrated a sufficient motivation to prove the claims of the class throughout the protracted history of this case. Therefore, the court accepts the plaintiffs as adequate representatives of the class.

Accordingly, defendants' motion to reconsider the memorandum opinion and order dated July 22, 1981 is denied.

/s/ JOEL M. FLAUM
UNITED STATES DISTRICT JUDGE

DATED: March 5, 1982

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM,
Plaintiffs,

v.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants.

76 C 427

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter is before the court on plaintiffs' motion for leave to file the appearances of certain attorneys as additional counsel for plaintiffs and the class. Specifically, plaintiffs seek leave of court to file the appearances of Thomas R. Meites, Lee H. Weiner and Lynn Sara Frackman of the law firm of Meites & Frackman. Mr. Meites has already appeared on behalf of the plaintiffs as co-counsel in the early stages of this action. However, he and his co-counsel withdrew their appearances in favor of substitute counsel after the court of appeals affirmed this court's decision that plaintiffs could not be adequate representatives of the class if they were represented by their original counsel. Plaintiffs now seek permission for Mr. Meites, along with two of his associates, to again represent plaintiffs and the class because they contend Mr. Meites' familiarity with and work on the issues and facts of this case will aid the class and because the circumstances which were the basis of the earlier rulings on adequacy of representation have changed such that plaintiffs can be adequate representatives of the class when represented by Mr. Meites and his associates.

Having reviewed the plaintiff's motion, affidavit and exhibit and the defendants' opposition to said motion, the

court finds that in the intervening years from the court of appeals decision to the present motion, the circumstances of Mr. Meites' association with the law firm of Prins, Flamm and Susman, Ltd. have significantly changed such that the potential conflict of interest and appearance of impropriety is no longer present. Accordingly, plaintiffs' motion for leave to file the appearances of certain attorneys is granted.

/s/ JOEL M. FLAUM
UNITED STATES DISTRICT JUDGE

DATED: September 8, 1982

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM,
Plaintiffs,

v.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants.

76 C 427

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter is before the court on defendants' motion to dismiss the complaint in its entirety or, alternatively, in part. For the reasons stated below, the motion is granted in part and denied in part.

This action arises out of a tender offer contest for the stock of Microdot, Inc. ("Microdot"). The amended complaint ("complaint") alleges violations of: § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) ("§ 14(e)"); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("§ 10(b)"); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"); and certain state and common law fiduciary obligations. A class has been certified. As alleged in the complaint the facts of this case are as follows:

Plaintiffs owned 200 shares of Microdot common stock from about March 30, 1971 to December 29, 1975. After the close of trading on December 2, 1975, General Cable Corporation ("General") announced through press releases and other means its intention to make an offer to purchase all outstanding share of Microdot common stock at a price of $17.00 per share. As a result of this announcement by General, the price of Microdot's common stock in the public exchange went up from $11.75 per share to

$17.00 per share when trading resumed on December 5, 1975. Microdot's management immediately launched a vigorous campaign in opposition to General's proposed tender offer. On December 5, 1975, Microdot announced in a news release that its Board of Directors had voted unanimously to recommend rejection of General's proposed offer. The news release indicated that Microdot intended to employ all of its available resources to defeat the offer. In addition, Microdot's president, Rudolph Eberstadt, Jr. ("Eberstadt"), issued a letter to Microdot's shareholders announcing that he and Microdot's management were opposed to takeover raids of medium size companies by large unrelated corporations because such takeovers stifle growth in the American economy. Despite this statement concerning Microdot's and Eberstadt's opposition to tender offers, Microdot was secretly negotiating for a friendly tender offer at a price substantially higher than the market price. These negotiations culminated in an announcement on January 26, 1976 by Northwest Industries ("Northwest") that it planned to make a tender offer for all of Microdot's outstanding shares for $21.00 per share. Microdot's officers and directors had previously secretly consented to recommend acceptance of that offer, which was formally made on January 28, 1976. Plaintiffs and members of the class, misled by Microdot's repeated statements opposing tender offers and deprived of the crucial information about Microdot's real intentions of soliciting a white knight takeover, sold their shares of Microdot common stock on the open market between December 5, 1975 and January 23, 1976.

Defendant's motion to dismiss is based primarily on *Panter v. Marshall Field & Co.* ("*Panter*"), 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Defendants first argue that the gist of the complaint is that defendants' allegedly wrongful acts caused plaintiffs to miss an opportunity to tender their shares at a higher price than the price for which they sold them. Defendants then contend that these claims of a lost tender opportunity fail to

state a violation of the federal securities laws under *Panter* because no tender offer was pending at the time of plaintiffs' sale of their shares in the open market. This assertion is based on the facts that the General tender offer was never made to Microdot shareholders and that Northwest's tender offer was not made until January 28, 1976. Defendants also argue that certain nondisclosures alleged in the complaint are not actionable. Specifically, defendants submit that they were not obligated to disclose their actual reasons for opposing General's proposed tender offer. Further, defendants maintain that they were not required to disclose their solicitations of a friendly tender offer.

In *Panter*, the court considered a situation in which a proposed exchange offer was announced whereby a combination of stock and cash was offered for each share tendered of the target company. The offer was conditioned on the fulfillment or nonoccurrence of twenty conditions. The target company opposed the offer and issued press releases to that effect. One week after the proposed tender offer was announced, the offer was withdrawn. None of the events that conditioned the tender offer had occurred. In the lawsuit, among other theories of recovery, plaintiffs alleged violations of § 14(e) against the target company and its directors. Specifically, the plaintiffs in *Panter* alleged that the defendants had violated § 14(e) by depriving plaintiffs of the opportunity to tender their shares to the tender offeror and by deceiving plaintiffs as to the attractiveness of selling their shares of stock in the target company in the open market. After examining the purposes of §14(e) as set forth in the legislative history and case law, the *Panter* court held that the plaintiffs had no cause of action under either theory proposed. With respect to the lost-opportunity-to-tender claim, the court stated that because "the tender offer was withdrawn before the plaintiffs had the opportunity to decide whether or not to tender their shares, it was impossible for the plaintiffs to rely on any alleged deception in making the decision to tender or not".

Panter, 646 F.2d at 283. Because this vital element of reliance was missing, the court concluded that plaintiffs failed to state a claim under § 14(e). Regarding the plaintiffs' other claim under § 14(e), the *Panter* court concluded that § 14(e) was not intended to remedy the conduct the plaintiffs' complained of and it held that "§ 14(e) of the Williams Act does not give a damages remedy for alleged misrepresentation or omissions of material fact when the proposed tender offer never becomes effective". *Panter*, 646 F.2d at 286.

In this case, the *Panter* decision impacts on both of plaintiffs' theories under § 14(e). Plaintiffs contend that even though the General tender offer was never made, a large amount of publicity was generated by the announcement of the intended offer and therefore sufficient pressure was imposed on the Microdot shareholders to invoke the protections of the Williams Act. However, because the General tender offer was never made, the plaintiffs' claim with respect to that tender offer comes squarely within *Panter* and fails to state a claim under § 14(e).[1] Plaintiffs also argue that they have a valid claim under § 14(e) because material omissions and misrepresentations were made in connection with the Northwest offer. That tender offer, however, was not announced until January 26, 1976 and was not made until January 28, 1976. Thus, although the existence of a tender offer actually made distinguishes this case from *Panter*, the *Panter* court's conclusions with respect to the legislative intent concerning § 14(e) indicates that plaintiffs do not have a claim under that section.

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[1] Plaintiffs argue that this case is distinguishable from *Panter* because they did actually sell shares of Microdot stock so that the reliance element of § 14(e) is met. This distinction is not persuasive. Even though plaintiffs sold shares of stock they still never had an opportunity to decide whether to tender shares to a tender offeror. It is that decision which is critical to a § 14(e) claim.

The court noted that § 14(e) was designed "to protect an investor faced with the pressures generated by the exigencies of the tender offer context. . . ." *Panter*, 646 F.2d at 285. The court also observed that the "protections of the Williams Act are required by the peculiar nature of a tender offer. . . ." *Id.* at 286. The *Panter* court then concluded that the plaintiff shareholders "were simply not subjected to the proscribed pressures the Williams Act was designed to alleviate". *Id.* In light of the "trend to avoid unduly expansive interpretations of the securities laws", *Id.*, this court concludes that the plaintiffs in this case were also not subjected to the pressures § 14(e) was designed to alleviate because during the time period plaintiffs sold their stock no tender offer was pending. Therefore, plaintiffs' claims based on § 14(e) are dismissed.

Turning to plaintiffs' claims based on § 10(b) and Rule 10b-5, a pivotal presumption underlies defendants' motion to dismiss. They contend that plaintiffs' claims can only be considered as asserting material nondisclosures rather nondisclosures and misrepresentations because the alleged misrepresentations do not materially misrepresent any facts. Defendants then also claim that the specific nondisclosures complained of are not actionable under § 10(b) or Rule 10b-5 as interpreted in *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462 (1977), because the claims only allege at most breaches of fiduciary duty. However, the court cannot accept as a matter of law at this stage of the litigation that plaintiffs have failed to allege material misrepresentations. The issue of materiality is "a mixed question of law and fact . . . [and the] determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him. . . . [T]hese assessments are peculiarly ones for the trier of fact". *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Furthermore, although "the securities laws do not require defendants to reveal their culpability or motives, [they do not] allow [de-

fendants] to make untrue statements of material facts or fail to state material facts necessary to cure misleading statements". *Atchley v. Qonaar Corp.*, No. 82-1696, slip op. at 7-8 (7th Cir. April 1, 1983). Under these standards, the complaint pleads sufficient facts to survive a motion to dismiss.[2]

Accordingly, defendants' motion to dismiss is granted with respect to the § 14(e) claims and denied in all other respects.

/s/ JOEL M. FLAUM
UNITED STATES DISTRICT JUDGE

DATED: May 23, 1983

[2] Although some of plaintiffs' alleged nondisclosures may not be actionable in isolation, the crux of plaintiff's complaint is that in the context of material misrepresentations, defendants had a duty to disclose.

Name of
Assigned Judge PLUNKETT

Case Number 76C 427 Date: March 18, 1986

Case Title: FLAMM V. EBERSTADT

* * *

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows:
(2) ☒ [Other docket entry:]

Defendants motion for summary judgment is denied. Plaintiff's motion to reinstate the section 14(e) claim is denied. Plaintiff's motion in limine is denied. Plaintiff's motion to amend the complaint is denied.

* * *

(9) ☒ Trial set for 31 Mar 86 at 10:15 a.m.

* * *

☒ Docketing to mail notices. MAR 19, 1986

Document # 173

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1986 MAR 18
CLERK
US DISTRICT COURT

Courtroom deputy's initials: /s/ DW